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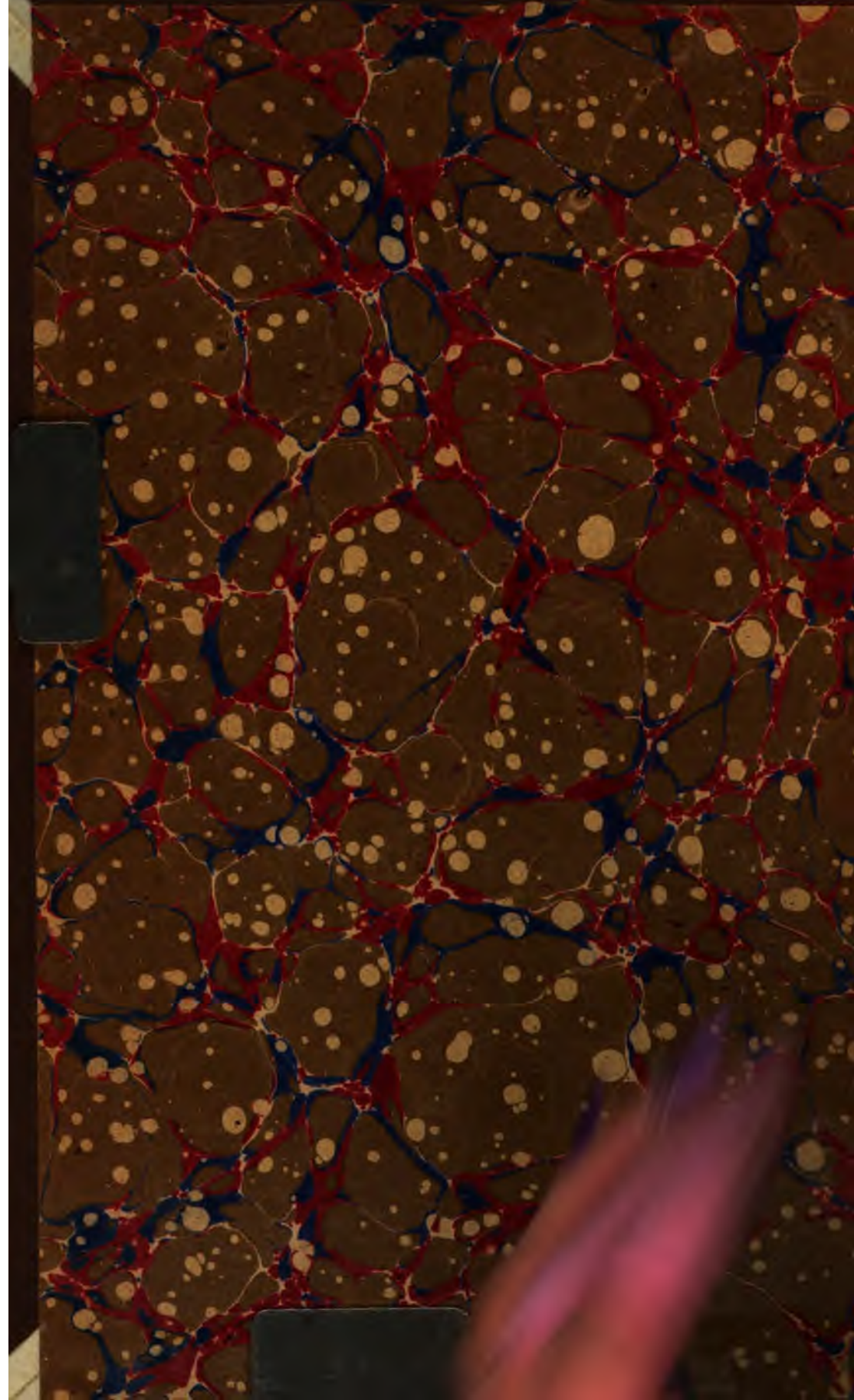
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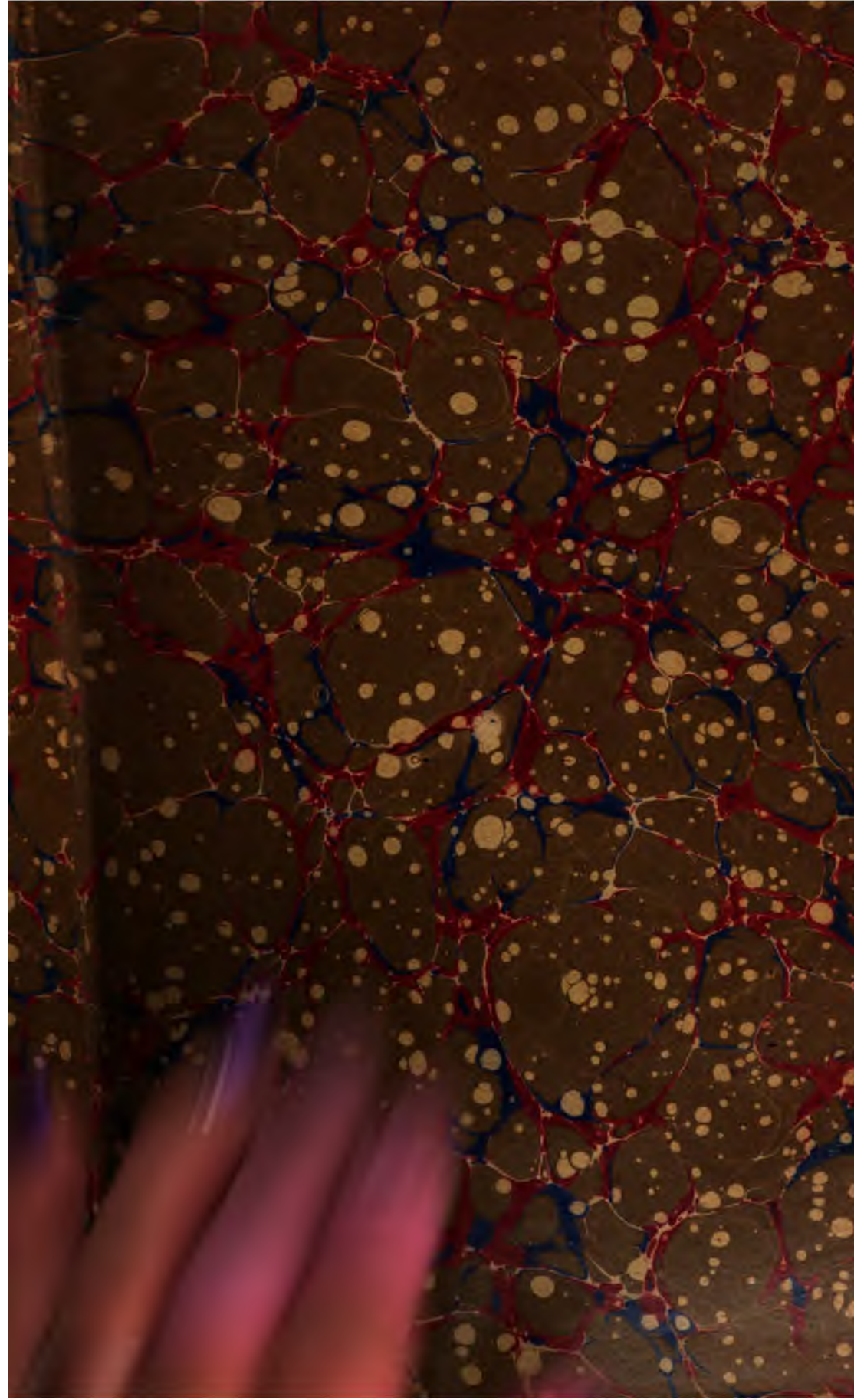
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EDITED BY SIR FREDERICK POLLOCK, BART., M.A., LL.D.

Corpus Professor of Jurisprudence in the University of Oxford.

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NOTES.

THE current series of the Law Reports will henceforth be referred to by the full form of citation. No practical abbreviation of the new year's date, 1900, occurs to us, and it seems better to write those of the foregoing years in full for conformity's sake.

Many lawyers must have observed with regret a tendency in recent decisions of the Judicial Committee to dispose in a somewhat offhand manner of questions involving principles of general importance. We venture to think that the judgment in *Cook v. Sprigg* [1899] A.C. 572, 68 L.J.P.C. 144, will be found not only uninformative but perplexing. The action was in substance a claim of title against the Crown, as represented by the executive government of the Cape Colony, by persons holding a 'concession' of certain rights in Eastern Pondoland from a native chief. After the 'concession'—a term, by the way, unknown to the common law, and not stated to be known to the Roman-Dutch law of the Colony—and, apparently, before the grantees had taken up their grant by acts of possession, Pondoland was annexed to the Cape Colony. The colonial Government refused to recognize the grant on several grounds of substance, and the Supreme Court of the Colony held that most of these grounds were good. One of them was that the 'concession' conferred no legal right before the annexation and therefore could confer none afterwards: which would bring the case exactly within *Doss v. Secretary of State for India in Council* (1875) L. R. 19 Eq. 509, where the claim was originally against the King of Oudh. Another ground which seems material, though noticed, so far as appears, only in argument, is that the 'concession' probably was, in the terms of our law, not a present grant of any estate, but a contract or licence, and thus the right existing at the date of the annexation, if any, would be merely personal, and the claimants had, at best, misconceived their remedy.

But the judgment of the Judicial Committee sweeps all these details aside. It says 'a more complete answer' to the claim is furnished by the fact that the acquisition of the territory was an act of State, and 'no municipal Court had authority to enforce such an obligation' as the duty of the new government to respect existing titles. We can read this only as meant to lay down that on the annexation of territory, even by peaceable cession, there is a total abeyance of justice until the will of the annexing Power is expressly made known; and that, although the will of that Power is commonly to respect existing private rights, there is no rule or presumption to that effect of which any Court must or indeed can take notice. With great submission, this doctrine appears to us neither sound nor convenient. It is contrary to the law of nations as generally understood, and we know of no warrant for it in the common law. The Indian cases relied on by their lordships were altogether distinguishable. On the other hand their lordships took no notice of a whole series of decisions in the Supreme Court of the United States, very properly and aptly cited in argument, in which a very different course was followed. Claims founded on old Spanish grants in Florida and Louisiana were examined and dealt with, as of right, according to the law under which the grants were made. The same principle was applied in Missouri, and later in California.

We humbly conceive that, according to all principles hitherto recognized (unless there be some very peculiar rule of Roman-Dutch law on the subject, which was not alleged), it was the business of the Supreme Court of the Cape of Good Hope to consider whether, on the day when the territory became British, the plaintiffs below had or had not a good title under the existing local laws and customs, whatever they were, and that the Court was quite right in doing so. If the Court had found them well entitled, as on the merits it did not, then only an act of legislation could have displaced their title. The reasons assigned by the Judicial Committee put all private rights in a newly-acquired territory at the mercy of the new executive power. We cannot think this correct.

If we are wrong, it is in Chief Justice Marshall's company. 'A cession of territory is never understood to be a cession of the property belonging to its inhabitants': *U. S. v. Percheman*, 7 Peters, 51, 87.

It seems rather strange that two of the three judges who compose the Supreme Court of Trinidad should have held that the stratum of 'pitch' lying underground in the neighbourhood of the Pitch Lake was to be treated, for legal purposes, as if it were water.

In fact, this curious deposit of crude asphalt, both underground and in the 'lake' itself, is neither liquid nor solid, but viscous, with enough inclination to solidity at the ordinary temperature of the climate to allow of walking, riding, and driving carts over it, and to require the use of a pick-axe to get it by digging. The Chief Justice, on the other hand, observed that asphaltum is a mineral, not water; and the Judicial Committee agreed with him: *Trinidad Asphalt Co. v. Ambard* [1899] A. C. 594, 68 L. J. P. C. 114, and held the ordinary rules of law to be applicable, both as to support and as to the consequences of wrongful appropriation. As their Lordships justly remark, 'The pitch, which is the peculiar product of this strip of land in the island of Trinidad, resembles water in one respect. At a certain temperature it becomes liquid.' So does iron.

McLeod v. St. Aubyn [1899] A. C. 549, 68 L. J. P. C. 137, determines in the main a mere matter of fact, viz. that *X*, who innocently lent a paper containing a scandalous attack upon a Court of Justice without knowing what the contents of the paper were, was not guilty of and could not rightly be committed for a contempt of Court. The importance of the case lies however not in the decision in favour of the appellant, but in the clear exposition by the Privy Council of the principle, which is sometimes forgotten, that a scandalous attack upon a Court after the delivery of judgment may amount to contempt. The judgment of the Privy Council is indeed in every way satisfactory. It warns the judges of subordinate Courts against undue use of the power to commit for contempt, and it reminds the public that the power of the Courts to enforce summarily that respect for their decisions which is absolutely necessary for the due administration of justice can rightly be extended as far as the necessity of the time requires.

X is a shipowner residing at Paris where he has his principal place of business. He has also an office in London where business is carried on for him by an agent. His ships trade between French ports and English ports, and other places. One of his ships comes on the high seas into collision with and damages a ship belonging to *A*. *X* is not in England. *A* under these circumstances wishes to bring in England an action *in personam* against *X* for the damage. The action is clearly not maintainable; and for the simple reason that as a general rule an action is not maintainable against a defendant who, at the time for the service of the writ, is not in England, and the case falls within none of the exceptions to this principle embodied in Rules of Court, Order XI, r. 1.

Let the case however be varied by one circumstance only, namely, that the ship causing the collision is owned not by X, an individual Frenchman, but by X & Co., a French company formed under French law whose head office is at Paris. A may then maintain an action *in personam* in the High Court against X & Co. It is possible, in short, to maintain an action against a foreign company where it would be absolutely impossible to maintain an action against an individual, whether an Englishman or a foreigner, who was not in fact in England. This is the effect of *La Bourgogne* [1899] A. C. 431, 68 L. J. P. 104, and must be now taken to be good law. All that a critic can say is that the decision in which the Probate Division, the Court of Appeal, and the House of Lords agree, establishes a curious anomaly which may lead to some inconvenient results.

Let it be particularly noted that with the general principle apparently established by *La Bourgogne*, namely, that a foreign corporation which does business in England in such a way as to be resident here may be sued here, and the writ may be served on its officer here, no one can quarrel. The point, if any, open to criticism is, that the Courts have in *La Bourgogne* treated the carrying on of business by a foreign corporation in England through an agent as equivalent to personal presence there, which it certainly is not in the case of an ordinary person. It is at least arguable that a corporation does business in England in such a way as to be resident there only when it has its head office in England.

Cases of fraudulent preference occupy or used to occupy a very large proportion of the time of the Court of Bankruptcy as everybody familiar with the proceedings there knows, and no small part of that time was spent over a psychological puzzle—debating the meaning of the words, ‘with a view of giving such a creditor a preference.’ When, for instance, a fraudulent trustee on the eve of bankruptcy prefers the cestuique trust creditor he has wronged, is that a fraudulent preference? The answer is, ‘Was his dominant motive to shield himself from a prosecution, or to favour the creditor?’ If it was to shield himself, then the payment or conveyance was not a fraudulent preference (*Sharp v. Jackson* [1899] A. C. 419, 68 L. J. Q. B. 866). Evidently the unjust steward’s transactions in the parable were not fraudulent preferences, for he was looking out, not for the creditors, but for himself—acting under the pressure of an anxious future. Of course a court of law has only to interpret the language which the Legislature has used to express—or conceal—its meaning, but it seems rather a pity that the Legislature should have made the equitable distribution of a

bankrupt's estate depend on what motive was uppermost in his mind on the eve of his bankruptcy. A debtor's act in paying one creditor before the rest because he is dangerous may be only means to an end—self-protection; but the mischief, whatever the motive—immediate or ulterior—is the same. To have the law settled, however, for better or worse, is great gain. It will do much to clear the list of fraudulent preference cases.

It is difficult, at any rate for an Englishman, to feel certain that he fully grasps the facts of *Scott v. Glasgow Corporation* [1899] A.C. 470, 68 L.J. P.C. 98. They may, however, we submit, be thus broadly summed up. The respondents, the Corporation of Glasgow, are the local authority who under Acts of Parliament, and especially the Animals Diseases Act, 1894, and the Markets and Fairs Clauses Act, 1897, have the control and management of a public market for the sale of imported foreign cattle held at the Foreign Animals Wharf, Pointhouse, Glasgow. Under the orders of the Board of Agriculture, this wharf is the only place in Scotland at which foreign cattle can be imported and there sold alive. Scott and others, the appellants, are a body of Glasgow butchers who import foreign cattle to Scotland for sale. Their course of business is to sell their cattle by auction at certain sale rings appropriated to the sale of cattle on the said wharf. But the appellants, while offering their cattle for sale by auction, do not offer their cattle for sale to all comers, but only to a certain class of purchasers, viz. members of the trade. This kind of auction at which goods are offered only to a certain body of purchasers is in no way opposed to the law of Scotland nor, it is submitted, to the law of England. The Glasgow Corporation, however, as the local authority, have made a by-law to the effect that the sale rings on the wharf at Pointhouse shall not 'be used for sales in which any class of the public are excluded from bidding or buying.' The practical effect of the rule undoubtedly is to prevent the appellants from selling anywhere in Scotland cattle imported from abroad otherwise than at an auction open to the whole public. The appellants therefore have appealed to the Courts to declare the by-law invalid. Both the Quarter Sessions and the House of Lords have upheld the by-law, and most persons who are not members of the body represented by the appellants will probably agree with the decision of the Courts.

Scott v. Glasgow Corporation illustrates in more ways than one the difficulty of the questions which are inevitably raised whenever the State undertakes to regulate the course of trade, and whenever the State is called upon to fix the proper limits to the right of association.

1. The orders of the Board of Agriculture issued under statutory powers have the effect of prohibiting the sale of foreign cattle at any market in Scotland except one.

2. The local authority which, under statutory powers, has the right to regulate the use of that particular market can make rules which in effect determine the terms on which the sales of foreign cattle take place at that market, and can therefore indirectly curtail the freedom of sale possessed at common law by every seller (see *Scottish Cooperative &c. Society v. Glasgow Fleshers Trade Defence Association*, 35 S. L. R. 645).

3. The intervention of the local authority in this particular instance secures 'freedom of trade' (i.e. freedom of purchase for the public) but it cuts down 'freedom of trade' (i.e. the right to sell on whatever terms the seller pleases) on the part of the appellants. The truth is that unlimited freedom of combination inevitably tends towards the creation of monopoly, whilst the unlimited freedom of each individual tends towards restriction on the right of association. Laws may adjust the relation, but can never remove the opposition between individualism and collectivism.

The decision of the Court of Appeal in *Walter v. Lane* [1899] 2 Ch. 749, 68 L. J. Ch. 760, to the effect that the reporter of a speech delivered in public has no copyright in the report when published, has given rise to much comment and discussion in the world of letters. As the case will come before the House of Lords, we offer for the present only two remarks. The Copyright Act, 1842, is a notorious and flagrant example of bad drafting, and the somewhat timid adherence of the Court of Appeal to the most literal interpretation of its terms does not seem necessary, nor, as matter of policy, desirable. Then we submit that the Court of Appeal hardly gave sufficient weight to the fact, well known to every one who has reported or been reported, that there is practically no such thing as a published verbatim report. The reporter has much more to do than to copy from dictation, expand the shorthand note, and correct obvious errors. He has to turn spoken language into grammatical and readable written language; and this, except in the rarest cases, is an operation requiring an appreciable amount of literary skill. Mr. Gladstone, we believe, was one of the few speakers whose speeches could often be printed, word for word, as they were delivered. But such are very few indeed.

When troops are brought into a county on the application of the magistrates for the purpose of preserving peace and order in the country, it is certainly fair that the County Council, and ulti-

mately the ratepayers, should pay for the food and lodging of the soldiers, but *Reg. v. Glamorgan Council* [1899] 2 Q.B. 336, 68 L.J. Q.B. 1047, C.A. decides, as far as the Court of Appeal can do so, that there is no legal means of compelling the County Council to pay what obviously ought to be a debt due from the county. We see no reason to think that the decision of the Court of Appeal, which was obviously regretted by the judges who gave it, is wrong, but we do see very strong reason for holding that Parliament should at once take steps to prevent a county from shirking its proper responsibilities.

It is a settled principle in the law of fraud that a party who has elaborately falsified or concealed facts for the purpose of deceiving another, and has thereby deceived him, cannot afterwards be heard to say that those facts were not material. *Gordon v. Street* [1899] 2 Q.B. 641, C.A., is a striking illustration of this principle. One may say of a loan of money that there is hardly any contract in which the personality of the party, on one side, is generally so indifferent. Any man's money is equally good for the borrower; and—apart from questions of undue influence and the like, which were not present here—the terms of the bargain are, in contemplation of law, made by the borrower as much as by the lender. Yet if a money-lender has gotten such an evil reputation that borrowers will not deal with him in his known name, and then assumes other names for the purpose of concealing his identity, this is good evidence of fraud for a jury. There may be no new law in this, but we think there is some advance in broad and bold handling of facts. We very much doubt whether any Court of common law would have supported findings similar to those in *Gordon v. Street* thirty or forty years ago.

The doctrine of equity as to a mortgagee not clogging the equity of redemption, after a flourishing career of centuries in Chancery, seems now beginning to be understood. The proposition of Sir Joseph Jekyll that a mortgagee cannot stipulate for a collateral advantage to himself is at all events untenable. He may so stipulate provided only that the condition is not unconscionable or oppressive. A brewer, for instance, may stipulate in advancing money to a publican, that the publican shall take his beer of the mortgagee-brewer, and a person who lends money on a lease of a theatre—a notoriously risky security—may in like manner stipulate for a share in the profits of the theatre, plus the repayment of his loan and interest (*Santley v. Wilde* [1899] 2 Ch. 474, 68 L.J. Ch. 681, C.A.). This is the latest view, but it is by no means clear that it truly represents the earlier view, or that Courts of Equity did not originally claim a much wider jurisdiction over this

class of bargains, namely to mould them when they seemed contrary to the spirit of their own notions of fitness, though not to the letter of the usury laws. Such a benevolent supervision was not ill adapted to a rude age. Indeed the Moneylenders Bill of last year was for reviving the jurisdiction in the County Court for the benefit of the oppressed small borrower; but barring such special victims as these the grandmotherly intervention of equity is now become an anachronism. It is a principle of more importance in modern days even than the doctrine of 'clogging,' that bargains freely made should be strictly kept. In the end such intervention fails to benefit the borrower, because it makes the security uncertain, and so raises the lender's terms. Persons interested in the subject should study the decisions of the Indian High Courts, especially that of Allahabad, where cases of this kind have been frequent. See *Kunwar Ram Lal v. Nil Kanth*, L.R. 20 Ind. App. 112; *Rajah Mokham Singh v. Rajah Rup Singh*, ib. 127.

Chandler v. Smith [1899] 2 Q. B. 506, 68 L.J. Q. B. 909, C.A., illustrates the nicety of the questions which may arise under the Workmen's Compensation Act, 1897, 60 & 61 Vict. c. 37. *A* is a workman in the service of a carpet manufacturer. Through an accident in the course of his work *A* loses the thumb of his right hand. He remains able to do same work, and his employer *X* pays him the same wages (£3 per week) as were paid him before the accident. *A* therefore incurs no immediate pecuniary loss, but his wage-earning power is diminished and on his leaving *X*'s employment, he will, owing to the loss of his thumb, earn lower wages than hitherto.

What, under these circumstances, is the liability of the employer, and how is it to be fixed?

The reply of the Court appears to be that a declaration should be made of the liability of *X*, but that the amount and the duration of the compensation payable to *A* should be fixed under Schedule I, cl. 17, if at any future time *A* should be unable by reason of the accident to earn as much as £3 a week. This answer appears to be a just one and exhibits the readiness of the Courts to give full effect to the statute, but it also shows what no fair-minded man can doubt, that the statute does introduce extraordinary complexities into the relation between employers and employed.

New Sombrero Phosphate Co. v. Erlanger (3 App. Cas. 1218) has so long been a landmark in company law that it is difficult to adjust our ideas to the restatement—the relaxation it seems at first—of the law as to a promoter-vendor's duty by the Court of Appeal in

Lagunas Nitrate Co. v. Lagunas Nitrate Syndicate [1899] 2 Ch. 392, 68 L. J. Ch. 699. In the *Erlanger* case Lord Cairns emphasized very strongly and very justly the responsibility of a promoter who sells his property to a company which he has himself brought into existence. 'They'—the promoters—says the Lord Chancellor, 'have in their hands the creation and moulding of the company. They have the power of defining how and when and in what shape and under what supervision it shall start into existence, and begin to act as a trading corporation.' Such a power over the destinies of the company involves a correlative responsibility, and this responsibility is commonly summed up in the term 'fiduciary relation.' These words, simple as they seem, are fraught with a dire significance to the promoter because they invest him with an altruistic character quite foreign to him. Not that being a promoter disentitles a man to sell his property to the company, but it imposes on him very inconvenient conditions. What Lord Cairns in *Erlanger's* case considered he must do was to furnish the company with an independent and competent board of directors to protect it from having an improvident contract fastened upon it by the promoter. The Court of Appeal has now laid it down that this is not essential, that it is sufficient for the promoter to disclose his interest in the prospectus. Theoretically this is no doubt right, but looking at the heedlessness of the investing public and the supineness of shareholders this sort of notice avails little for practical purposes. It will not prevent the directors, as the vendor-promoter's puppets, from adopting the contract which wrecks the company.

It seems now to be generally admitted that an action for malicious prosecution will lie against a corporation. At any rate counsel for a corporation defending such an action thought it useless to contend in the Court of Appeal that the action does not lie, and the appeal proceeded wholly on the merits: *Cornford v. Carlton Bank, Ltd.* [1900] 1 Q. B. 22.

All is fish that comes to the law reporter's net, and the story of the unique Hope blue diamond—apparently part of a wonderful gem which Tavernier brought from India and sold to Louis XIV—is a pleasing diversion among the tangle of company cases and points on the construction of statutes: *Re Hope* [1899] 2 Ch. 679, 68 L. J. Ch. 625, C.A. No one save the disappointed applicant will regret the decision of the Court that the tenant for life who has the custody of such an heirloom must make out a very strong case to induce the Court to sanction a sale.

More than twenty years ago, in 1877, *Diggle v. Higgs*, 2 Ex. D. 422, decided that a repentant gamester may recover any stake he has deposited with a stakeholder at any time before the stakeholder has executed his original authority to hand it over to the winner. In *O'Sullivan v. Thomas* [1895] 1 Q. B. 698, a Divisional Court decided that s. 1 of the Gaming Act, 1892, did not affect this right. The implied contract or rather quasi-contract of the stakeholder to return the money does not arise out of any gaming agreement, but out of the revocation of an authority given in furtherance of a gaming agreement. This decision seems to have been wholly overlooked in *Shoolbred v. Roberts* [1899] 2 Q. B. 561, 68 L. J. Q. B. 998, where it was argued that *Diggle v. Higgs* is not law since the Gaming Act, 1892. Fortunately for the law's consistency the Court rejected the argument on its merits.

De minimis non curat lex, at any rate as regards granting an injunction, when a local authority seeks to restrain a clergyman from holding open-air services on foreshore leased to that authority by the Crown, and the plaintiffs fail to show that there is in fact any substantial nuisance. The Court, however, denied that a clerk of the Church by law established had a better legal right than any other man to preach on the foreshore (*Llandudno Urban District Council v. Woods* [1899] 2 Ch. 705, 68 L. J. Ch. 623).

Re Hollis' Hospital & Hagues' Contract [1899] 2 Ch. 540, 68 L. J. Ch. 673, is a case of much interest, not only because it decides a moot point in the law as to perpetuities, but on account of the broad view taken by the judge as to the construction of the common law. The case may be shortly stated as follows. Freeholds were conveyed by lease and release to *W* in fee to the use of trustees for charitable purposes: the release contained a proviso that 'if at any time hereafter the premises hereby conveyed . . . shall be employed . . . for any other use . . . than as hereinbefore mentioned . . . then and from thenceforth . . . the premises hereinbefore conveyed . . . shall revert to the right heirs of *T. S.* party hereto.' The trustees contracted to sell the property, and the question arose whether on the conveyance being executed the property would revert to the heir at law of *T. S.* It was argued on the one hand that the clause of reverter was a common law condition to which the rule of perpetuities does not apply, and on the other hand that as the trustees only took the fee by virtue of the Statute of Uses, the clause must operate as a shifting use to which the rule applies, and that the clause of reverter was therefore void. The Court held on the authority of *Shep. Touch.* 120, and *Serjeant Rudhall's* case, *Savile*, case clv. p. 76, that a condition may

be annexed to a limitation of uses whereby the uses or the estates arising from the uses may be made void. It followed in the present case that the clause of reverter was a common law condition subsequent, and the question arose Was it void for perpetuity? a question which had not been judicially decided. The Court laid down two principles, which though they are familiar to conveyancers are perhaps not as well known as they ought to be. *First*: 'For the exposition of our very complicated real property law, it is proper in the absence of judicial authority to resort to text-books which have been recognized by the Courts as representing the views and practice of conveyancers of repute.' (It may be convenient to mention the following authorities on the point though they were not cited: *Re Ford & Hill*, 10 Ch. D. at p. 370; *Re Athill*, 16 Ch. D. at p. 223; *Howard v. Ducane*, T. & R. 81, 87, 23 R. R. 190; *Heelis v. Blain*, 18 C. B. N. S. at p. 108; *Smith d. Doe v. Jersey*, 2 Brod. & Bing. 473, 599, 22 R. R. 19.) *Second*: 'The Courts have to find what is the common law—that is the principle embodied in what is called the common law—and to apply it to new and ever-varying states of fact and circumstances. The common law is to be sought in the expositions and declarations of it in the decisions of the Courts and in the writings of lawyers. New statutes and the course of social development give rise to new aspects and conditions which have to be regarded in applying the old principles. The policy of the law against the creation of perpetuities was certainly asserted at a very early date, as was also the policy of discountenancing unrestricted restraints upon alienation.' The Court decided that the condition in question is obnoxious to the rule against perpetuities on the ground of 'the expressions of opinion of Jessel M.R.' in *Re Macleay*, L. R. 20 Eq. 186, of North J. in *Dunn v. Flood*, 25 Ch. D. 629, 'and Baggallay L.J.' S. C. on appeal, 28 Ch. D. 592, and 'the opinions of two great real property lawyers and text-writers' (Sanders, *Uses and Trusts*, 5th ed. vol. 1, pp. 206, 207, 213; Lewis on *Perpetuity*, ed. 1843, pp. 615, 616) 'in favour of the invalidity of such a condition as the one in question; besides the opinions of modern text-writers; while on the other side there is nothing definite except the opinion and reasoning of the late Mr. Challis in his work on real property' (see Challis, R. P., 2nd ed., pp. 174, 175).

Having regard to the great development that the law as to perpetuities has received of late years, it would not have been very difficult to predict what the decision of the Court on the question would be, but we are glad to find that the question came for decision before a judge who was thoroughly familiar with the law of

real property, and whose decision therefore may be considered as finally settling it.

When Sir George Jessel said that a person in possession under an agreement for a lease was in as good a position as a lessee, it was pointed out by Cotton L.J. in a subsequent case that this proposition was only true where the agreement was one which the Court would specifically perform. Cozens-Hardy J. has just had occasion (*Cornwall v. Henson* [1899] 2 Ch. 710, 68 L. J. Ch. 749) to call attention to a similar qualification of the commonly made and received statement that the effect of a contract for sale of land is to make the purchaser from that moment in equity the owner of the land. If the vendor, for instance, is not in a position to obtain a decree for specific performance by reason of some defect in title, or if the purchaser is not in a position to obtain a decree by reason of some delay or repudiation of the contract, the purchaser is not, and never was, in the view of the Court, owner in equity of the property. The Court only treats that as done which ought to be done. This distinction is attended with important consequences as *Cornwall v. Henson* illustrates, because a vendor is entitled, on the purchaser's virtual repudiation of the agreement, to act as true owner both at law and in equity, and among other things to grant a lease of the property even though the purchaser has been led into possession. *Cornwall v. Henson* was a strong case, because the purchaser there had paid all the purchase money—£150—except £10: yet the Court held that he could not recover any of it back, or have a lien on the property for it. But when people act as the purchaser there did, making default in his instalments, and letting the land go to rack and ruin, they must not expect the Court to regard them with an indulgent eye. It was only when the purchaser thought he saw his way to getting the house which the lessee had built on the land without paying for it that he began to insist on his rights.

The Agricultural Holdings (England) Act, 1883 (46 & 47 Vict. c. 61), s. 57, does not exclude the right of a tenant to claim under an agreement outside the Act compensation for improvements in respect of which he might have claimed compensation under the Act. This is the effect of *In re Pearson & FAnson* [1899] 2 Q. B. 618. The decision of the Q. B. Div. seems in itself reasonable enough, though a little difficult to reconcile with the actual words of s. 57. Its principal importance, however, lies in its showing the disposition of the Court to give effect to the present policy of our law and fully to protect a tenant's right to compensation for

improvements. We do not for a moment say that the judgments of Grantham J. and Kennedy J. are wrong. All we assert is that, as the latter seems to have felt, it was possible to give to the enactment a construction less favourable to the tenant than the meaning placed upon it by the Q. B. Div. The decision, however, is aided by the sound principle that Acts of Parliament shall not be construed in derogation of express agreements which are not clearly contrary to their terms or policy.

When a company sells and transfers its assets to another by way of reconstruction no shareholder can be compelled to embark in the new enterprise, and if he refuses he has a right to be paid in cash the value of his share of the assets, such value to be agreed with the company, or assessed by arbitration under s. 162 of the Companies Act, 1862. But experience has shown that there is scarcely anything harder to value than the share of a reconstructing company. There is seldom a market price, and the amount credited on the share by the new company has been judicially held to be no criterion. The shareholder has not the wildest idea of what he ought to get; the company offers him something ridiculously small, and yet if he puts his claim too high, he may have to pay the costs of arbitration. To meet this difficulty a company inserted in its articles a clause fixing a value, to wit the price at which the liquidator should have sold shares in the new company not taken up by the members of the old company. This is a fair enough valuation; at all events it presented a means of solving a constantly recurring difficulty, but the Court of Appeal in *Baring Gould v. Sharpington Combined Pick and Shovel Syndicate* ([1899] 2 Ch. 80, 68 L. J. Ch. 429) had no option but to hold such an article invalid. It was not (1) an 'agreement' between the company and the shareholder, and (2) it infringed the shareholder's statutory right to a valuation under the machinery of s. 162. The result may, in the particular case, be matter for regret, but it is a salutary lesson to promoters that the attempt, too often made now, to insert in articles waiver clauses operating in derogation of shareholders' statutory rights and in favour of the promoters, cannot be relied on to be successful.

It certainly seems, as Lindley M.R. remarks, as if s. 25 of the Companies Act, 1867 was for ever to be the subject of controversy. Every line of it is riddled with decisions: what is a payment in cash, what is a contract, what is 'at or before the issue' of the shares, what is meant by consideration, most of all what is requisite in the statement of the consideration? Until the *Kharaskhoma* case nobody realized that the consideration had to appear on the face of

the contract filed, that it would not do for it to be stated merely by reference to an unfiled contract. There was a flutter among holders of vendors' shares when this was known, which had to be quieted by the Companies Act, 1898. The Courts seem now to be receding from the altitude of severe virtue expressed in the *Kharaskhoma* case, and think it enough to satisfy the section if the filed contract states on its face the general character of the consideration, though the public have to go to an unfiled contract (*Re Frost & Co.* [1899] 2 Ch. 207, 68 L. J. Ch. 544; *Re African Concessions* [1899] 2 Ch. 480, 68 L. J. Ch. 724) to identify it. Public policy may in fact be strained too far. Section 25 was never meant to make people pay for their shares twice over, but to checkmate the practice of paying for shares in an illusory consideration.

W has, at least once, condoned the conjugal irregularities of *H* her husband. Whilst they are living together, *H* makes a statement to *W* the substance of which is that he has never been faithful to her and never can be. She expresses her willingness to live with him if he will abandon the sort of life he is leading, but he refuses. She thereupon declines to live with him and they have ever since lived apart. *H* afterwards reiterates by letter his determination not to alter his mode of life. At the end of two years from their separation *W* petitions for divorce on the ground of desertion and adultery. The Court hold that she is entitled to divorce. This is shortly the effect of *Sickert v. Sickert* [1899] P. 278, 68 L. J. P. 114. Every person of sense will rejoice at a decision which by a somewhat bold judicial interpretation of the Divorce Act goes very near towards placing wife and husband on an equality as regards the right to divorce.

Sir Francis Jeune came to the conclusion in *Loustalan v. Loustalan* ([1899] 68 L. J. P. 106) that a Frenchman and Frenchwoman domiciled in France might, in marrying in England, elect to adopt the English matrimonial system without adopting the English rule embodied in s. 18 of the Wills Act, which makes marriage operate as a revocation of an antecedent will of either of the spouses; in other words, that the revocation rule belongs not to the matrimonial but to the testamentary part of English law. The rule was not, it need hardly be said, invented by the framers of the Wills Act. It had existed long before in a slightly different shape (*Cruise's Dig.*, p. 89, s. 45). Under the law prior to the Wills Act marriage revoked the wife's antenuptial will, and for a very natural reason, that marriage operated as a gift of all the wife had to her husband; in the husband's case for marriage to revoke an antenuptial will there had to be also the birth of a child. It is plain what this

rule points to—provision for children ; and this policy of our law is corroborated by decisions under the old law, that if the child was otherwise provided for, the revocation rule did not apply. The Wills Act merely took this rule and enlarged its operations by making it absolute and applicable, child or no child, and this with good reason, otherwise a husband might be willing away all his wife's personalty under a will made before marriage with her. Looked at in this way it is difficult not to regard the rule as part of our matrimonial system. The broad policy of the law is that a man when he marries must reconsider his whole position in view of his new matrimonial and possibly parental obligations, and the law compels him to do this so far as regards the disposition of his property by cancelling previous testamentary dispositions.

The results of the Peace Conference at the Hague are summed up by Prof. Holland in the December number of the Fortnightly Review, and in particular he shows with great clearness how the first ambitious projects of compulsory arbitration were saved from complete wreck only by the substitution of Lord Pauncefote's more modest but really practical scheme. The permanent Court—or rather machinery for appointing a Court as required—which is to be established at the Hague will have no compulsory power even on paper. Governments may use the machinery or not as they will. But, as Prof. Holland says, 'it is quite possible'—we should venture to read probable—'that the mere existence of such a Court, with its rota of judges, its bureau fixed at the Hague, its archives and its officials, may in time produce among the Powers a habit of referring their disputes to it for settlement.' It is not wise to say that conference is barren because it does not lead at once to decisive conventions. It may lead, though gradually, to the formation of custom which will ultimately be stronger than any convention.

Found in an ancestral diary, *sub anno* 1840: 'Motto for a successful lawyer. *Levant and couchant*, lying and rising.' Who was the author of this? Is it published anywhere? F. P. .

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PROPOSED IMMUNITY OF PRIVATE PROPERTY AT SEA FROM CAPTURE BY ENEMY¹.

THE proposal that nations should recognize the immunity of private property at sea has been discussed by many writers in England, the United States, and France. It was also warmly advocated by the United States at the Congress of Paris in 1856, when she declined to sign the Declaration on Maritime Law unless a provision on this subject were added, and it was recently brought forward at the Hague Conference, though ruled beyond the scope of its deliberations. It has been introduced into several treaties². Still profound disagreement prevails among writers and statesmen as to the form progress in this branch of International Law can take.

The Institute of International Law at its meetings in 1874, 1875, and 1877 declared itself in favour of the principle that private property, whether neutral or enemy, sailing under enemy flag or neutral flag, should be inviolable.

Professor Lorimer has gone the length of holding this to be the rule of law of Europe and its non-recognition as the exception³.

We frequently read in humanitarian writings on the rights of belligerents at sea, that the object of reform should be to assimilate property at sea to property on land, on the assumption that the natures of war at sea and war on land are identical, and that immunity of private property on land is already admitted as a principle of International Law.

I shall in this paper endeavour to clear away some of the obscurity which has resulted from a too desultory treatment of the subject, to examine it in its connexion with the recognized laws of war generally, to discuss whether indeed, in itself, immunity is desirable and whether there is any likelihood of a great maritime country like England agreeing to the alienation of a right of capture, necessarily of greater importance to it than to a country whose power and interests are territorial.

¹ Read at the Conference of the International Law Association at Buffalo, N. Y.

² U. S. and Italy—Treaty of February 26, 1871. In the Austro-Prussian War of 1866 the principle of inviolability was adhered to by both parties. Germany proclaimed the same principle in 1870 but afterwards abandoned it.

³ Lorimer's Institutes of the Laws of Nations, vol. ii. p. 94.

OF WAR GENERALLY.

War is an armed conflict between communities or nations as such. These communities or nations may be represented by constituted authorities and armies—but it is not a duel confined to these authorities and armies. Armies are recruited from the communities and nations behind them, and it is on the vitality and material resources of these communities or nations that the continuance of the war depends.

It is a temporary suspension of the usages of peace and it brings into play another set of usages, called the laws of war. Originally the belligerent exercised the right of life and death over the whole armed and unarmed population against which he was warring, and he claimed the same absolute power of disposition over all their property.

An invading army, before the practice of war became more refined, lived by foraging and pillage in the invaded country. Pillage, in fact, was one of the inducements held out to the adventurers who formed part of the fighting forces, either as officers or as common soldiers, down to comparatively recent times.

Attenuations naturally followed from the rise of standing and regular armies and the consequent more marked distinction between soldier and civilian. They have taken the form of compounding for plunder, systematic requisitions and contributions, the confining of the right of levying these to generals and commanders-in-chief, the institution of quittances or bills drawn by the belligerent invader on the invaded power and handed in payment to the private persons whose movable belongings have been appropriated or used and of war indemnities. All these are methods of lessening the hardships of war as regards the private property on land of the subjects of belligerent states.

Now if we look into the tendency of these attenuations we find that it is not to arrive at immunity, but to develop an organized system by which damage and losses to individuals, whom the fortune of war has brought into immediate contact with the enemy, are spread over the whole community. Those, therefore, who speak of the immunity of private property in warfare on land do not accurately describe the existing state of things¹.

To substitute systematic for chaotic seizure and plunder on land was obviously in the interest both of invader and invaded, and

¹ We must take care not to attach much importance to isolated exceptions, such as the invasion of France in 1813 and that of Mexico by the United States, which prove nothing.

humanity in this as in many other cases has only been another term for the common interest of mankind.

Grotius describes war in his time as the letting loose of 'some fury with a general licence for all manner of wickedness,' and indeed we can imagine the terrors of an invasion which meant the seizure of the food on which the natives of the invaded country were dependent for existence, the carrying away of bedding, implements, and horses, the slaughter of livestock, the appropriation of the stored seed grain. We know how long it took Germany to recover from the devastation of the Thirty Years War, and if we compare the state of things in that period with the revival of France after the war of 1870, we may well rejoice that the common interest of states has substituted orderly—'plunder' though it be—for the wanton seizures of a time when the common interest of mankind had not yet become a matter for consideration among the motives of a nation's conduct.

TENDENCIES AS REGARDS NAVAL WARFARE.

The considerations which have led mankind to systematize the practice of war in regard to private property on land do not arise in the same form in connexion with private property at sea. Here there is no question of seizing the livestock or the bedding, or the food or the utensils of the private citizen.

Here we have to deal with mercantile ventures. If ship and cargo are captured it may be hard upon the merchant, but such captures do not directly deprive him of the necessaries of life. Yet, as in the case of war on land, its hardships have been attenuated, and progress has been made by developing a more systematic procedure of capture of private property at sea. Thus exemption from capture is now allowed by belligerents to enemy merchant ships which, at the outbreak of war, are on the way to one of their ports, and they also allow enemy merchantmen in their ports at its outbreak a certain time to leave them¹. A somewhat similar practice exists as regards pursuit of merchant ships which happen to be in a neutral port at the same time with an enemy cruiser². Privateering has been abandoned by the Powers which signed the Declaration of Paris of 1856, and so strong is public opinion in Europe against it that the United States and Spain in their late

¹ In the Franco-German War of 1870, the commanding officers of the French fleet were ordered to grant thirty days' respite to enemy's trading vessels to leave French ports in case they should be there, or enter in ignorance after outbreak of war. The Germans allowed a respite of six weeks for the same purpose.

² It is a general rule that when two vessels of hostile nations meet in a neutral port the local authorities are to detain one till twenty-four hours after the departure of the other.

war, though not signatories of the Declaration, both spontaneously waived the right to resort to it. Yet the only difference the abolition of privateering makes is the substitution for amateur or irregular warships of vessels officered and enrolled as a part of the official navy¹.

Lastly has grown up, on grounds similar to those which have led to the indulgence shown to private property on land, a now generally recognized immunity from capture of small vessels engaged in the coast fisheries, provided they are in no wise made to serve the purposes of war.

This has all been done with the object of making the operations of war systematic, and enabling the private citizen to estimate his risks and take the necessary precautions to avoid capture, and of restricting the acts of war to the purpose of bringing it to a speedy conclusion.

IS IMMUNITY OF PRIVATE PROPERTY AT SEA IN ITSELF DESIRABLE?

We have seen that there is no immunity for private property yet known to the laws of war. War, by its very nature, prevents the

¹ The Declaration of Paris contains another historical acknowledgment of the common interest, not this time of belligerents, but of mankind generally in exempting from capture the property of the neutral in enemy vessels. It also exempted from capture the property of the enemy in neutral ships. These were victories of the neutral interest over that of belligerents. The latter exemption assumes that, just as the private property of the citizens of a belligerent state is protected from capture on neutral land, it should also be protected from capture on the neutral ship which is held to be under the territorial sovereignty of the state whose flag it carries. It is significant that, in spite of the Declaration of Paris, necessity of war has been held to justify the destruction of neutral property on an enemy's merchant vessel without compensation. Thus, in 1870, the French cruiser *Desaix* captured the German vessels *The Ludwig* and *The Vorwaerts* and burned them on the day of capture. Part of the cargo of these vessels belonged to British subjects (neutrals). The owners claimed compensation, but the Conseil d'État held that, though the Declaration of Paris exempts the goods of a neutral on board an enemy's ship from confiscation, and entitles the owner to the proceeds in case of a sale, yet it gives him no claim to compensation for any damage resulting from the lawful capture of the ship, or from any subsequent and justifiable proceedings of the captors (Wheaton, p. 493; Dalloz, *Jurisprudence Générale*, 1872, Pt. III. p. 94).

Hall (*International Law*, p. 722), commenting on the above case, says: 'It is to be regretted that no limits were set in this decision to the right of destroying neutral property embarked in an enemy's ship. That such property should be exposed to the consequences of necessary acts of war is only in accordance with principle, but to push the rights of a belligerent further is not easily justifiable, and might under some circumstances amount to an indirect repudiation of the Declaration of Paris. In the case for example of a state the ships of which were largely engaged in carrying trade, a general order given by its enemy to destroy instead of bringing in for condemnation would amount to a prohibition addressed to neutrals to employ as carriers vessels the right to use which was expressly conceded to them by the Declaration in question. It was undoubtedly intended by that Declaration that neutrals should be able to place their goods on board belligerent vessels without as a rule incurring further risk than that of loss of market and time, and it ought to be incumbent upon a captor who destroys such goods together with his enemy's vessel to prove to the satisfaction of the prize court, and not merely to allege, that he has acted under the pressure of a real military necessity.'

growth of any such immunity. The tendency in war on land has been to spread its effects over the whole community, to keep a faithful record on both sides of all confiscations, appropriations and services enforced against private citizens, but beyond this no protection has thus far been given to private property on land.

War, we have said, is an armed conflict between communities or states. The object of each belligerent is to break the enemy's power and force him to sue for peace. To break his power it is not enough to defeat him in the open field; he must be prevented from repairing his loss both in men and in the munitions of war. To bring the war to an end may imply crippling his material resources, his trade, and his manufactures.

To capture at sea raw materials used in the manufacturing industry of a belligerent state, or products on the sale of which its prosperity, and therefore its taxable sources, depend, is necessarily one of the objects, and one of the least cruel, which the belligerents pursue.

To capture the merchant vessels which carry these goods, and even to keep the seamen navigating them prisoners, is to prevent the employment of the ships by the enemy as transports or cruisers and the repairing from among the seamen of the mercantile marine of losses of men in the official navy.

Is it then desirable that war should be made less a calamity than it thus is—that is, beyond the elementary principle that individuals should be made as little as possible to suffer for the act of the community?

Until war is brought home to the civilian it has few terrors. If its abolition is an object to be striven for—and we must assume that it is till the arguments to the contrary are supported by more irrefutable evidence than we yet possess—we can see from the evidence around us of the armed nations of Europe that conscript armies, in which every civilian is also a regular soldier, tend to the preservation of peace, and in this respect they are not an unmitigated evil.

On a recent occasion it was instructive to contrast the readiness of English politicians to plunge England into war with the quiescence of the French, who have come to look upon war only as the terrible last resource for the most vital of national questions, to whom war means that the men who declare it must be prepared to sacrifice themselves, their sons and kindred to it. It does not make for peace to confine the hardships of war to the fighting of a professional soldiery on land or to the fighting of professional warships at sea.

CAN DOMESTIC LAW GIVE RELIEF?

The assimilation of private property at sea to private property on land we have seen would mean that the state to which the captured vessels belonged should indemnify the ship and cargo owners for their loss.

Thus the humanizing of war as regards private property is not only a matter of international law; it is also, and indeed mainly, a question of domestic regulation. Such indemnification has become a principle in war upon land, and it may become a question of the future how, by domestic regulation, to deal with captures by the enemy of property at sea. In the case of naval war, however, the circumstances are not exactly the same. After the outbreak of war, every shipowner and shipper belonging to a belligerent state know the risk they incur in sending ships or goods across sea. They have, moreover, the option of keeping their ship or cargo in port, or of paying war rates of insurance, or again, the shipper has the option of sending his goods under the protection of a neutral flag. If they expose their ship or cargo to the risks of capture, it is that they have calculated the chances of escape, and have chosen to run the risks. To indemnify them for losses incurred might be to relieve the shipowner and shipper from the consequences of their want of foresight and caution.

Still, if their property is captured and confiscated, a proper record of the confiscation is kept, the ship and cargo are valued or sold, and the state whose flag the ship carried *can* indemnify the owner, and thus here again spread over the community a loss suffered by the individual citizen.

It is conceivable that means may some day be devised of indemnifying for capture at sea on a reduced valuation, combined with a licence to put to sea, but on these matters no experiments seem yet to have been made by which we can judge.

IMMUNITY FROM MOTIVES OF EXPEDIENCY.

States, from motives of expediency, may agree not to capture the property of private citizens during a particular war with each other, as in the case of Italy and Austria in 1866, or they may by treaty provide for a similar immunity of their respective private citizens in the event of a future war between them. The United States have made it an article of their policy to insist upon the adoption of immunity of private property from capture as a primary principle in the reform of the law of maritime warfare. England has

as resolutely upheld the contrary principle. Both have been actuated by their own interest. Napoleon Bonaparte considered that the greatest blow which could be dealt to England would be to compel her to give up her maritime rights¹. And Nelson was of the same opinion, holding that nothing could be more injurious to the maritime interests of this country than the adoption of the principle of 'free ships, free goods,' which is now, nevertheless, the rule binding upon us under the Declaration of Paris.

Whether it is expedient for England at the present day to agree to the immunity of private property at sea from capture, must be dictated by the circumstances of the particular war in which she engages. It is quite conceivable that different considerations would weigh with her in a war with the United States from those which would arise in a war with France or Germany. In the case of the United States it might be in the interest of both parties to localize the operations of war, and to interfere as little as possible, perhaps for the joint exclusion of neutral vessels, with the traffic across the Atlantic. In the case of a war with France or Germany, England might consider that the closing of the high sea to all traffic by the merchantmen of the enemy would be very much to her own interest.

It is often argued that England would, on the whole, be benefited by the immunity of her commerce from capture, inasmuch as she is exposed to a combination of the Powers against her, which might prevent her from exercising such a protection over her maritime trade as would render its transference to neutral bottoms needless. My learned and eminent friend, Mr. Westlake, has pointed out that transfers of ships to neutral flags which were not bona fide would not be valid against a belligerent, and that it would soon be discovered that for cargoes, carried by vessels specially registered in connexion with the war, the rates of insurance would be almost as heavy under the neutral as under the belligerent flag². Certainly belligerent cargoes, having, *ceteris paribus*, the alternative of using a ship liable to capture or one not so liable, would choose the latter, but this could not affect the great mass of traffic of a carrying country like England, which alone possesses the means of doing its own trade, and in all probability fast sailing vessels would run the risks of capture.

In conclusion, apart from expediency, necessity of war, that is the necessity in which, by the nature of things, a commander is placed of preserving his own forces against destruction, and of

¹ Halleck, vol. ii. p. 17.

² International Law (1894), p. 250.

defeating the forces of the enemy, must always stand in the way of any abandonment of the belligerent right to seize all the enemy's property, whether private or public, which can serve him in the accomplishment of either object; any attenuations as regards private property have never extended beyond the prevention of wanton destruction and plunder, and the equalization of the burden of the losses.

THOMAS BARCLAY.

THE AUSTRALIAN COMMONWEALTH BILL.

THE Australian Commonwealth Bill embodies the political ideals of a Constitutional Assembly, convened in the closing years of the nineteenth century, and favoured by conditions which afforded a unique opportunity for the achievement of grand constitutional results. All history for precedent! All the world-wide literature of political science for a guide! Freedom from the domestic necessities which impede the action of statesmen in older countries! Freedom to legislate for the territories of a Continent! Such conditions lend a singular interest to the Bill which is now to be submitted to the Imperial Parliament. If I may venture to pass from statements of fact to an expression of opinion, the Australian Federal Convention was an assembly of which no nation in the world need have been ashamed. So much at least is suggested by a perusal of the four bulky volumes which represent the result of its labours.

The clauses of the Commonwealth Bill have already secured some attention in the pages of this REVIEW¹. The special object of the present article is to illustrate the fundamental principles which underlie these clauses and to explain their significance. In attempting to attain this object my chief difficulty has been to repress a very natural tendency to excursus. Every single clause of the Bill has its history, and affords material for a volume. Some of the clauses indeed bear the marks of violent times; almost all carry with them an atmosphere of judicial interpretation and elaboration. It is indeed to the rich legacy of unwritten lore that the authors of the Bill are chiefly indebted for their success in achieving a conspicuous brevity. I shall humbly endeavour to follow in their footsteps, telling a plain tale in a plain way, only very occasionally attempting an elaboration of obscure points or a criticism of motives or of policy. The subject naturally falls into three grand divisions: Imperialism, Federalism, Democracy.

A. THE CONSTITUTION AND IMPERIALISM.

The Federal Commonwealth of Australia is to be under the protection and subject to the control of Great Britain. The Imperial principle, consecrated in the preamble, is also recognized distinctly in every department of the Federal Government.

¹ April and July, 1899. Articles by Mr. Lefroy.

(1) The legislative supremacy of Great Britain remains, with slight alterations which may affect the occasions on which that supremacy is displayed but leave its existence unchallenged. The Commonwealth Bill can only become law by an enactment of the Imperial Parliament, and any future amendments thereon, or indeed any ordinary legislation of the Australian Federal Parliament, can only become law upon securing the Royal assent. That assent may be given directly or through the agency of the Governor-General whom the Queen appoints. (2) The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General acting with the advice of a Federal Executive Council. (3) In judicial matters the Privy Council still remains the court of ultimate appeal wherever the interests of some other part of the Empire are affected, or where the Queen grants special leave of appeal from the Federal High Court in matters not involving the interpretation of the Constitution (though the Federal Parliament may limit the matters in which such appeals may be asked), or, finally, where litigants who appeal from the Supreme Courts of the States choose to submit their cases to the Privy Council in preference to the Federal High Court. The oath of allegiance is sworn to 'Her Majesty Queen Victoria, Her heirs and successors according to law.'

Mr. Lefroy, in his most recent contribution to this REVIEW¹, has drawn attention to certain provisions of the Commonwealth Bill 'which would clearly invade what has hitherto been deemed the Imperial area of power.' These provisions empower the Federal Parliament to legislate upon external affairs, to control fisheries in Australian waters beyond territorial limits, to regulate the relations of the Commonwealth to the islands of the Pacific, and to enforce the laws of the Commonwealth on all British ships, other than men-of-war, which trade between ports of the Commonwealth. The last of these provisions, so far from introducing a novelty, is taken from the Federal Council of Australasia Act, 1885: and so far from representing a design upon the Imperial power, had been inserted in the Federal Council Act in a more extended form, and upon the initiative of the home authorities. The precise words of the Act of 1885 deserve quotation. Laws were made enforceable 'on all British ships, other than Her Majesty's ships of war, whose last port of clearance or port of destination is in any such possession or colony.' The earlier editions of the Commonwealth Bill contained this clause in its less restricted form. Speaking thereon, Sir John Downer said²: 'Seeing that the Imperial Parliament, acting under the advice of the Board of Trade, inserted a clause which

¹ July, 1899.

² Convention Debates, Sydney, 1897, p. 242.

is identical both in words and substance with the clause now proposed, I do not think any conflict can possibly arise, but some conflict may be prevented by following the lines which the Imperial Parliament not only suggested but persisted in. The drafters of the Federal Council Act, now in force, never drew any clause like this—never hoped for any extension of their authority like this. It was forced upon them by the liberality of the Board of Trade and the Imperial Parliament, and we accepted it, as we naturally would accept all good things.' Ultimately, however, the clause was modified so as to read, 'The laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance *and* whose port of destination are in the Commonwealth.' By this change the laws of the Commonwealth were confined to ships trading between ports of the Commonwealth. It would seem strange if the Australian Commonwealth were refused a power which is materially less than the Imperial Parliament had voluntarily and at its own initiative conferred upon the Australian Federal Council.

The power of controlling fisheries in Australian waters beyond territorial limits was also conferred by the Federal Council Act. It has proved one of the most useful of the powers sanctioned by that Act. By virtue of it, laws have been passed for the Colonies of Queensland and Western Australia, providing for the collection of customs, the regulation of pearl fisheries, and the enforcement of police rules. The preamble of the Queensland Act reads as follows:—

'Whereas, by certain Acts of Parliament of the Colony of Queensland, provision has been made for regulating the pearl-shell and bêche-de-mer fisheries in the territorial waters of that Colony: and whereas, by reason of the geographical position of many of the islands forming portion of that Colony, vessels employed in such fisheries are, in the prosecution of their business, sometimes beyond the territorial jurisdiction of Queensland: and whereas it is expedient that the provisions of the said Acts should extend and apply to such vessels during all the time they are so employed, and that for that purpose the provisions of the said Acts, so far as they are applicable to extra-territorial waters, should be extended to such waters by an Act of the Federal Council of Australasia,' &c.

The power to legislate upon the relations of the Commonwealth to the islands of the Pacific was another of the privileges conferred upon the Australasian Federal Council by the Act of 1885. The power to legislate upon external affairs is a new departure of doubtful significance. The Bill appears to aim at providing a general power which will apply to such future emergencies as may

come within the principle which the home authorities have already sanctioned in the matter of the Pacific Islands.

The discussion of doubtful clauses must not, however, blind us to the true Imperial significance of the Commonwealth Bill. If the Federation of Canada has promoted the interests of the Empire, and has strengthened the bonds between the Dominion and the mother country, I see no reason to anticipate less fortunate results with respect to the Federation of the Australian Colonies. 'So far from the union of the (Canadian) provinces weakening the connexion with Great Britain and the Empire,' writes Mr. Lefroy in the article to which reference has been made, 'never, I am convinced, was that connexion more firmly established or dearer to the hearts of the people.'

B. THE CONSTITUTION AND FEDERALISM.

An uncompromising dualism is the most striking principle of the Commonwealth Bill, and often imparts a novel significance to the most innocent clauses. Rules of constitutional law, long familiar to English readers, have been borrowed and modified by reference to Federal requirements, or, while retaining their old form, have been endowed with a new spirit, justified by new objects, and devoted to strange purposes. The constitution of the Senate affords a forcible example. The functions of that branch of the Legislature might be presumed to be *conservative*: they are pre-eminently *federal*. Rules, again, which might suggest to an English critic a jealousy of parliamentary power, are often no more than attempts to preserve the weaker States from the oppression of the stronger. When, for example, we read that 'the Federal Parliament may confer bounties, but so that such bounties shall be uniform throughout the Commonwealth,' we must not too hastily adopt the conclusion which Mr. Lefroy suggests, that the Federal Convention was animated by a distrust of parliamentary institutions. Rather should we see an illustration of the extent to which the delegates, moved by an enthusiasm for the Federal ideal, were on the alert to embody that ideal in the constitution. The Canadian precedent, in strict accordance with this attitude of mind, was ruled out of court. 'Canada,' one of the delegates remarked to me, 'may have a great future before her, but she is no true Federation if I understand that term aright. The Governor-General appoints the senators who are supposed to represent the Provinces. The Lieutenant-Governor of a Province is appointed by the Dominion Government, to which he is responsible for his actions, and to which he must look for his remuneration. The Governor-General may veto the Acts of Provincial Legislatures when in any way prejudicial to the interests of the Dominion.'

What is a Federation? The answer to this question is rendered difficult by differences of opinion which arise from a confusion of the essential and the accidental. The fundamental characteristic of a Federation may be best described as a State dualism bearing a close analogy to that great social dualism which was expressed in the medieval theory of the Holy Roman Empire. A Federal Government may be defined as one in which the private citizen owes allegiance to two political bodies which are distinct in organization, and mutually independent in the exercise of their authority. The practical realization of this definition involves three essentials: (1) the co-existence of central and local governing bodies which are mutually independent of each other; (2) a supreme tribunal which is invested with the power of deciding disputes between these bodies, and generally of interpreting the constitution which defines their several spheres of control; (3) an organization of the nation, which is distinct from the organization of the Governments, and is empowered to amend the constitution as occasion may require. The meaning of this definition may be illustrated by the Government of the British Empire, which displays, under the semblance of dependence, the reality of a very imperfect dualism. The imperfections of this anticipation of dual government may be examined from the points of view of theory and practice. Theoretically, the colonial Governments are deficient in independence, since their Parliaments exercise a subordinate, not a co-ordinate power, and derive their authority from the Imperial Parliament, and not from some power behind it: practically, they enjoy an independence which exceeds the normal limits of a member of the dual state, since the matters which are held to be of a common concern, and therefore within the province of the central Government, are exceptionally few in number and limited in scope.

The Federal essentials are strikingly illustrated in the Australian Commonwealth Bill. (1) The Government of the Commonwealth is complementary to the Governments of the States, and the exercise of civil authority belongs, in some matters exclusively to the Commonwealth, in other matters either to the Commonwealth concurrently with the States, or to the States exclusively of the Commonwealth. (2) The Federal High Court interprets the constitution. (3) The amendment of the constitution involves an appeal to an authority which is superior alike to the Governments of the States and the Government of the Commonwealth—an absolute majority of both or of either of the Houses of the Federal Legislature, sanctioned by the direct popular approval of a majority of the electors in the Commonwealth and a majority of the

electors in a majority of the States. But the Federal principle is carried far beyond the requirements of the Federal definition. It invades departments of the Commonwealth Government, and occasionally prescribes limitations upon the exercise of parliamentary powers. The latter point, already made the subject of passing reference, may be further illustrated by the section of the constitution which allows the Government of the Commonwealth to impose taxation, 'but so as not to discriminate between States.' The presence of the Federal principle in the departments of the Commonwealth Government is a far more significant fact, and calls for detailed consideration. It demonstrates how completely the Convention was dominated by the assumption, sanctioned by precedents of doubtful applicability, that the restriction of the authority of the Commonwealth 'to matters of common concern as between the States,' afforded no ground for constructing the Commonwealth Government on strictly national lines.

The Commonwealth Legislature consists of the Governor-General, the Senate, and the House of Representatives. While the powers of this Legislature are confined to matters which must be regarded as common or national, its organization is federal. The Senate, far from being a very distinctively conservative body, is elected upon the same franchise as the House of Representatives, and the relation of the two Houses must be sought in the determination to introduce a political dualism into the constitution of the central authority. Even in the House of Representatives no State is to have less than five members, whilst in the Senate each State will be represented by six senators. Such a preference for duality finds some support in precedent, but the value of that support is weakened by the homogeneity of the Australian population, by the great disproportion between the States in wealth, territory, and population, and by the fact that the small number of States must prevent such a balancing of interests as might be secured by the conflict of many delegations. Moreover, according to the clause which prescribes the method of amending the constitution, no alteration which diminishes the proportionate representation of a State in either House of Parliament can become law unless it has been approved by a majority of electors voting in the State whose representation is affected. This additional restriction on amendment bears a close analogy to attempts, occasionally made but necessarily ineffectual, to impose legal limitations upon the sovereign authority. Professor Burgess attacks a similar clause in the constitution of the United States¹: 'From the standpoint of political science, I regard this legal power of the legislature of a single

¹ Burgess, *Political Science and Constitutional Law*, i. pp. 153, 154.

Commonwealth to resist successfully the will of the sovereign as unnatural and erroneous. It furnishes the temptation for the powers back of the constitution to reappear in revolutionary organization and solve the question by power, which bids defiance to a solution according to law. There is a growing feeling among our jurists and publicists that, in the interpretation of the constitution, we are not to be strictly held by the intentions of the framers, especially since the whole fabric of our State has been so changed by the results of rebellion and civil war. They are beginning to feel, and rightly too, that present conditions, relations, and requirements should be the chief consideration, and that when the language of the constitution will bear it, these should determine the interpretation. From this point of view all the great reasons of political science and of jurisprudence would justify the adoption of a new law of amendment by the general course of amendment now existing, without the attachment of the exception: and in dealing with the great questions of public law, we must not, as Mirabeau finely expressed it, lose the *grande morale* in the *petite morale*.

The Federal Executive consists of ministers who are appointed by the Governor-General and are dismissed at his pleasure. But no minister of State can hold office for a longer period than three months unless he is, or becomes, a member of either House of the Federal Parliament. Such provisions imply an intention to establish responsible government. Time alone can show how far this intention will be realized. The Federal principle, which has been expressly embodied in so many parts of the constitution, may ultimately dominate the executive department to an extent incompatible with the retention of responsible government. The Convention anticipated a ministerial responsibility to the House of Representatives. But the constitution appears to provide no complete security against a senatorial assertion of coequal control. As a matter of fact, the Senate can boast a democratic franchise, can reject all money bills, and can urge the peculiar character of its mission as a body specially charged with the protection of State interests. The procedure in case of deadlocks, although it offers to the House of Representatives an opportunity to override the Senate in matters of legislation, is too elaborate to afford an adequate means of securing ministerial independence. But the introduction of a system of dual responsibility would seal the fate of responsible government. Australian Cabinets have been apt to follow one another in rapid succession under normal conditions. They would cease to command a popular respect if these conditions were altered in the direction of an added instability. Since, then, the triumph of Federalism within the sphere of the executive is incompatible

with the continuance of responsible government, the question as to which of these must conquer and subdue the other is a question of great practical importance as well as of considerable speculative interest. The student who observes the present drift of Australian politics will foresee at least three possible developments, which vary in their nature according to the extent to which the Federal principle receives recognition. In the first place that principle may be completely subordinated by the Senate's frank acceptance of a position of inferiority analogous to that which is held by the Canadian Senate—a nominee body without equality of State representation. If this event should happen the result must be regarded as a proof of the power of population as a great moral factor. The advantage in this respect, as well as in the matter of money bills and deadlocks, must always rest with the House of Representatives. A second, though very improbable, development would involve a partial triumph of the Federal principle. We can easily conceive the possible recognition of an unwritten law that no Ministry which holds the confidence of the Lower House need resign unless the total number of its supporters in both Houses numbers less than the total number of its opponents. A third possible development would involve a less partial triumph of the Federal principle. Responsible government may be abandoned in favour of an executive elected for a definite period by both Houses sitting in joint session. It is indeed far from improbable that some such system of an elective Parliamentary Executive will supersede responsible government even in the State constitutions.

The provision for a complete system of Federal Courts, as distinct from State Courts, affords a further proof of the Federalism of the constitution. The subject has been dwelt upon by Mr. Lefroy¹, who affirms the superiority of the Canadian scheme as less elaborate and less expensive.

C. THE CONSTITUTION AND DEMOCRACY.

If the Australian Convention displayed a preference for the very qualified unity of a highly federated organization, the devotion to democracy was more conscious and was more often made the subject of complacent eulogy.

‘I welcome the constitution as the most magnificent institution into which the chosen representatives of a free and enlightened people have ever breathed the spirit of popular sentiment and of national hope.’—Mr. Kingston.

‘Nothing can be done under the constitution which is contrary to the will of the people.’—Sir Edward Braddon.

¹ LAW QUARTERLY REVIEW, April, 1899, p. 164.

‘It is a constitution framed for a free people.’—Mr. Barton.

‘If ever there was a people’s constitution it is this one.’—Mr. Holder¹.

Such expressions find their justification, or at least their explanation, in the constitution of the Senate, in the limitations upon senatorial powers, and in the express adoption of the principle that political issues should be submitted to the arbitrament of the popular vote. (1) The Senate is an elective body and its franchise, identical with that of the Lower House, embraces the principle of one man one vote. (2) The restrictions which the constitution imposes upon the power of the Senate derive a democratic significance from the fact that the Senate, although elected on a radical franchise, enjoys certain conservative attributes by virtue of the equality of State representation, the longer tenure of the senatorial office, and the retirement of senators by rotation. What, then, are the restrictions upon the Senate’s power? They refer to money bills and to deadlocks. With respect to the former, the Senate may not originate appropriation or taxation bills, or amend taxation bills or the annual appropriation bill, or amend any bill so as to increase the financial burdens of the people.

The subject of deadlocks is dealt with in a section of the constitution which deserves attention from its great practical importance, from the prolonged and animated consideration which it received at the hands of the Convention, and from the possibility of its adaptation to the requirements of English politics. The debates on the subject would fill a volume. The ultimate solution may best be stated in the language of the Bill:—

‘If the House of Representatives passes any proposed law and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, and if after an interval of three months the House of Representatives, in the same or the next session, again passes the proposed law with or without any amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General may dissolve the Senate and the House of Representatives simultaneously. But such dissolution shall not take place within six months before the date of the expiry of the House of Representatives by effluxion of time.

‘If after such dissolution the House of Representatives again passes the proposed law with or without amendments which have been made, suggested, or agreed to by the Senate, and the Senate rejects or fails to pass it, or passes it with amendments to which the House of Representatives will not agree, the Governor-General

¹ Jethro Brown : *Why Federate*, p. 52.

may convene a joint sitting of the members of the Senate and of the House of Representatives.

'The members present at the joint sitting may deliberate and shall vote together upon the proposed law as last proposed by the House of Representatives, and upon amendments, if any, which have been made therein by one House and not agreed to by the other, and any such amendments which are confirmed by an absolute majority of the total number of the members of the Senate and House of Representatives shall be taken to have been carried, and if the proposed law with the amendments, if any, so carried is affirmed by an absolute majority of the total number of the members of the Senate and House of Representatives, it shall be taken to have been duly passed by both Houses of the Parliament, and shall be presented to the Governor-General for the Queen's assent.'

The absolute majority which this section provides was one of those amendments which the Australian Premiers suggested at a conference convened with the object of making the Bill more palatable to the electors of New South Wales. As the Bill had left the Federal Convention, a proposed law required the sanction of three-fifths of the members of both Houses actually present and voting. The change to an absolute majority of the total number of the members of both Houses assumes an additional significance from the fact that the House of Representatives is to be, as nearly as practicable, twice as large as the Senate. The Premiers' Conference took a scarcely less important step in extending the principle of deadlocks to all proposals for the amendment of the constitution. The Federal Convention, in defining the initial procedure for such amendments, had required the approval of an absolute majority of both Houses. Under the present Bill, the Governor-General may submit a proposed law to the referendum if it has twice secured an absolute majority of either House, although the other House has on each occasion failed to pass the proposed law, or has passed it with amendments to which the first House cannot agree. But I shall have occasion to refer again to this procedure in discussing the third evidence of democratic tendency—the direct reference of political questions to the popular vote.

The reference of political questions to the popular vote is effected in two ways. (1) A deadlock between the two Houses in a matter of ordinary legislation is followed by a double dissolution, and the general elections which ensue must inevitably turn upon the particular subject in dispute. (2) In the case of amendments of the constitution the democratic principle is carried further in two respects. The proposed law is expressly referred to the aye or no of the elector; and when the electoral vote is once recorded the matter is removed from the sphere of parliamentary control. This

express employment of the referendum as a constitutional expedient is a departure from traditional usage of such vast importance that the precise conditions of its application deserve attention. It is only applicable to a proposed amendment of the constitution which has received the consideration of both Houses and bears the stamp of their united approval, or at least of the reiterated approval of the House in which it originated. The proposal must then be submitted to the popular vote, and must secure the approval of the majority of the electors in the Commonwealth, and of separate majorities of electors in a majority of the States. In all ordinary cases the proposal is then ready to receive the Queen's assent. In certain exceptional cases, however, the constitution prescribes an additional requirement, the legal validity of which has already been made the subject of reference. 'No alteration diminishing the proportionate representation of any State in either House of the Parliament, or the minimum number of representatives of a State in the House of Representatives, or increasing, diminishing, or otherwise altering the limits of the State, or in any manner affecting the provisions of the constitution in relation thereto, shall become law unless the majority of the electors voting in that State approve the proposed law.'

W. JETHRO BROWN.

THE COMMONWEALTH OF AUSTRALIA BILL.

IN the April and July numbers of this REVIEW Mr. A. H. F. Lefroy published two articles on the Commonwealth of Australia Bill which add to the debt under which he had already put all students of colonial institutions by his work on the 'Legislative Power in Canada.' The ground he covered was so extensive that there could not but be some matter of contention, and I propose in this article to suggest certain new readings of the constitution, and from the standpoint of 'the man on the spot' to combat some of his political inferences.

In the first place, Mr. Lefroy finds fault with the terminology of the Bill, and particularly censures the terms 'Commonwealth' and 'House of Representatives' (p. 157).

(1) *The Commonwealth*.—The Canadian title 'Dominion' was inapplicable, because the union was to be of a kind different from the Canadian union. Rightly or wrongly the title 'Dominion' has come to suggest that prevalence of the central power which is the mark of Canadian union, and the domination of the Union Government in State matters is the very thing which from 1890 has been seen to be impossible in Australia. The origin of the title 'Commonwealth of Australia' was I believe a suggestion of Sir Henry Parkes in the Constitutional Committee of the Convention of 1891, and was his tribute of admiration to Cromwell and the men of the Commonwealth period. In other minds, I have no doubt, the title was associated with Mr. Bryce's work on the American Commonwealth, which in 1891 was a comparatively new book. The discussion in the Convention as to the title of the Union was sufficient to divest it of any republican significance.

(2) *The House of Representatives*.—The American flavour of this name cannot be denied, but it is not altogether new in Australian Constitutions. Earl Grey's Act of 1850, furnishing constitutions to all the Australian Colonies, empowered them to substitute for the single-chambered legislature 'a Council and House of Representatives,' or other separate Houses. None of them adopted the name, but in New Zealand the General Assembly does consist of a Council and House of Representatives. The reasons against adopting the name 'House of Commons' in the Constitution are good enough. With great respect to Canada, there is for us one House of Com-

mons and one only; you cannot translate the thing or its traditions, and the name alone is in Canada or Australia meaningless or misleading. If we look to history, we find that it is the Senate rather than the House of Representatives which recalls the *Comunitas Communitatum*, the assembly of the organized political communities. If we look to practical politics, we see that the Lower House cannot claim in relation to an elected Upper House the same supremacy which the Lower House claims in England and in Canada. Whether responsibility in any sort to two authorities is a practicable form of government Australian experience will show. On the one hand, Dr. Hearn held a strong opinion that even in England the Ministry owed some responsibility to the Lords; on the other, the dual responsibility to two sections in one Chamber brought the Canadian Constitution of 1841 to deadlock. In any case, the Australians have done wisely to provide in advance machinery for opening the road should deadlocks come to pass.

The Governor-General.—Mr. Lefroy (p. 283) expresses the opinion that the limitation of powers by section 2 to such 'powers and functions of the Queen as Her Majesty may be pleased to assign' to the Governor-General, disposes of the doctrine of implied powers as far as that officer is concerned. That doctrine is that a Governor has *virtute officii* all the prerogatives of the Crown incident to the government of a colony; and while it has long been known to be inapplicable to colonial governors generally, it has been asserted, as Mr. Lefroy states, in Canada and Australia that the grant of responsible government clothes the Governor with the full powers of the prerogative.

So far as the prerogatives incident to legislation are concerned no difficulty has been experienced, as the constitutional instruments are sufficiently clear and confer ample powers; the difficulty has been experienced in regard to executive powers residing in the Crown but not expressly conferred upon the Governor in the Letters Patent creating his office, or in his commission or instructions.

This being the position, it is, I think, more than doubtful whether section 2 touches the question at all. The Constitution is divided into chapters. Chapter I deals with the Parliament; Chapter II with the Executive Government. In Chapter I, § 1 provides that—

'The legislative power shall be vested in a Federal Parliament, which shall consist of the Queen, a Senate, and a House of Representatives.'

Section 2 is the section relied on by Mr. Lefroy. It provides that—

‘A Governor-General appointed by the Queen shall be Her Majesty’s representative in the Commonwealth, and shall have and may exercise in the Commonwealth during Her Majesty’s pleasure, but subject to this Constitution, such powers and functions of the Queen as Her Majesty may be pleased to assign to him.’

This seems to refer exclusively to the legislative power, and leaves the executive power untouched. Executive power is governed by section 61, and is in the very ample terms quoted by Mr. Lefroy:—‘The Executive power of the Commonwealth is vested in the Queen, and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.’ The question might still arise whether, without any enactment of the Commonwealth Parliament and without express grant from the Crown, the Governor-General might exercise in federal matters such prerogatives as the Crown may possess. Of course we have every reason, from the repeated declarations as to the character of a Governor’s authority, to believe that he could not; but the Constitution does not appear to indicate any thing one way or the other.

If, however, Mr. Lefroy’s view is correct, and section 2 does define generally the position of the Governor-General, the section may raise more difficulties than it settles. For the Governor-General is described as ‘Her Majesty’s representative in the Commonwealth,’ and the same term is used in sections 61 and 68, which vests in him the command-in-chief of the naval and military forces of the Commonwealth. I am not aware of any Statute, Letters Patent, or Commission, which describes a Colonial Governor in such terms. It is true that sometimes text-book writers and judges do so refer to him; but more than once the Judicial Committee (in *Cameron v. Kyle*, 3 Knapp, 332, and *Hill v. Bigge*, 3 Moore, P. C. 476) have used the term ‘the representative of the Queen’ as descriptive of a Viceroy who is by this description distinguished from a Governor who is ‘an officer merely with a limited authority from the Crown.’ Officially, a Governor is ‘the officer administering the government.’ The Lord-Lieutenant of Ireland and the Governor-General of India have an exceptional status. Each of them has been described as a Viceroy in more than popular language. The Lord-Lieutenant of Ireland represents his Sovereign, and holds the royal power by delegation in that ‘distinct dominion’; like the Crown itself, he dispenses honours; the Irish Courts have declared him to be exempt during his term of office from all actions at law in respect of his political acts, and have held language clearly indicating that the exemption is not confined to political acts

(*Napper Tandy's case*, 27 St. Tr. at 1262). The Governor-General of India has been officially described since Canning's time as 'Viceroy and Governor-General,' though the Royal Warrant of appointment does not use the term Viceroy. If the Governor-General of Australia is to be by statute 'Her Majesty's representative in the Commonwealth,' as distinguished from the agent of the Crown for the purposes of legislation and executive government, his status appears to be raised above that of a Colonial Governor; he will be to other Governors what an Ambassador is to the other classes of diplomatic agents. Though his powers and functions may be limited to such 'as Her Majesty shall be pleased to assign to him,' there are still prerogatives which are not connected with legislative or executive authority which may belong to him.

The Legislative Powers.

Subjects of Legislation.—Mr. Lefroy speaks of the extra-territorial powers as 'marking a new departure, for they clearly invade what has hitherto been deemed the Imperial area of power as distinguished from that of even self-governing colonies' (§ 288-9). Two of the powers he instances have however been possessed by the Federal Council of Australasia since 1885—'fisheries in Australasian waters beyond territorial limits,' and 'relations with the islands of the Pacific.' The Federal Council has exercised its powers to regulate the pearl, shell, and bêche-de-mer fisheries in Australian waters adjacent to the colonies of Queensland (51 Vict. No. 1) and Western Australia (52 Vict. No. 1). In each case a schedule to the Act sets out what are to be deemed Australian waters under the Act, and it is provided that the Act shall apply only to British ships and to boats attached to British ships, a limitation overlooked by the United States when they invoked these Acts in support of their claims to regulate the seal fisheries in the Behring Sea.

Colonial powers are by no means necessarily restricted to the three-mile limit. For instance, the Bay of Conception is by statute part of the colony of Newfoundland, and the extent of the legislative power of that colony was strikingly exemplified in the *Direct U. S. Cable Co. v. Anglo-American Telegraph Co.*, 2 App. Cas. 394. Colonies, too, may exercise governing powers over other dominions of the Crown; indeed for many years the regular form of a Governor's Commission has been Governor of the Colony of — and its dependencies. An illustration of the relation of a self-governing colony to its dependency may be found in the case of Queensland and British New Guinea. The Administrator of British New Guinea in the exercise of his legislative and administrative powers is to be guided by the Governor of Queensland,

who is directed to consult his Executive Council in all matters relating to British New Guinea as he does in Queensland affairs. The Administrator submits his estimates to the Governor of Queensland, and his accounts are audited by Queensland officers; and the Supreme Court of Queensland is the court of appeal for New Guinea. It is probable that the Commonwealth of Australia will claim that the Governor-General shall have the powers which are now possessed by the High Commissioners of the Pacific, and shall exercise them on the advice of his Executive Council. There will be no power in the Commonwealth Parliament to legislate for any place outside the Commonwealth, unless such place is surrendered by any State, or is placed by the Crown under the authority of the Commonwealth (§ 122). The power to legislate on 'external affairs' is a somewhat dark one, especially as the principal 'external' matters over which control is desired are enumerated, e.g. immigration of aliens, naturalization, the influx of criminals, &c. One useful purpose the power may serve. As Mr. Lefroy has shown in his 'Legislative Power in Canada,' there is much doubt as to the meaning of the power to legislate for a colony. Does that mean merely that a colonial law is not entitled to enforcement (as distinguished from recognition) in other parts of the Queen's dominions, or does the limitation operate locally as well as exterritorially, and require the Courts of the Colony itself to determine whether the Act exceeds the bounds of a local and territorial legislature? Very different opinions have been held in the colonies, and it is not certain that the decisions of the Judicial Committee in *Ashbury v. Ellis* [1893] A. C. 339, and *Macleod v. Reg.* [1891] A. C. 455, are quite consistent. The power of the Commonwealth Parliament to make laws on 'external affairs' should, it is conceived, establish the doctrine that in the Courts of the Commonwealth Commonwealth laws, like Acts of the Imperial Parliament, cannot be impugned on the ground that they reach beyond local affairs; in other words, the rule against laws 'intended to operate exterritorially' will within the Commonwealth be a rule of construction only, and not a rule in restraint of power.

There is one power conferred upon the Commonwealth Parliament to which Mr. Lefroy does not allude, but which seems to me more far-reaching and perhaps more dangerous than those which are merely concerned with external affairs. The 38th Article of legislation includes the power to 'exercise within the Commonwealth, at the request or with the concurrence of the Parliaments of all the States concerned, any power which can at the establishment of this Constitution be exercised only by the Parliament of the

United Kingdom or by the Federal Council of Australasia.' This article may lead to serious trouble. Claims to legislative independence have been founded on lighter grounds than this; and, as Mr. Lefroy points out, the theoretical power of the Imperial Parliament to recall constitutional powers is not one of great practical value. Under this article it would seem that the Commonwealth Parliament might, at the request of a State Parliament, repeal any Act of the Imperial Parliament applicable in the colony; in other words, the Commonwealth and State Parliaments, acting together, might nullify Imperial legislation. Here, if anywhere, the Imperial Parliament may in the future be said to have intended to divest itself of authority. It is not enough that we may be able to show by abstract reasoning that this is not or could not be the case.

It has been well said that a law should be so drawn not merely that it may be understood by those who read it in good faith, but that it should be impossible to misunderstand it, or even to pretend to misunderstand it.

I am not sure that I apprehend that part of Mr. Lefroy's argument which turns on the meaning of an 'exclusive power' (p. 290). In Canada, it is true, the powers both of the Dominion Parliament and the Provincial Legislatures are in their respective spheres expressed to be 'exclusive'; but in the Australian constitution, following the American, we do not use the term 'exclusive,' excepting in respect to powers which are not amongst those he discusses (§ 52).

Constitutional Limitations.—I now turn to a matter which is one of political inference rather than juridical interpretation. Mr. Lefroy sees (pp. 285, 286, 291, &c.) in the restrictions upon the power of Parliament that distrust of legislatures which is characteristic of America but is absent from the Canadian Constitutions, based as it is upon the plenary power of the Imperial Parliament. I believe that whatever the future may bring forth, Australian institutions do not as yet betray any of the distrust which is shown in the United States Constitution, and increasingly in the Constitutions of the States in America; and with all respect, I think Mr. Lefroy has misread the signs. Restrictions upon the power of the Commonwealth Parliament we certainly do find, but no more than are to be accounted for by the fact that the Constitution is a federal pact. As Professor Dicey says, 'the foundations of Federal State are a complicated contract'; and the inference of trust or distrust in government to be drawn from restrictions turns on this—Are the restrictions to be accounted for by the fact that this is a contractual union, or are they restrictive of government irrespective altogether of the nature of the political organism?

I think that the restrictions are, with one or two unimportant exceptions, of the first class.

I will grant at once that the prohibition of laws imposing religious tests or disabilities, and the provision requiring that offenders against Commonwealth law shall on indictment be tried by jury, and in the State where the offence was committed, support his case. But the other limitations to which he calls attention, in *trade*, in *finance*, and in defining the exercise of certain functions by the two Houses of Parliament, are no more than are required to secure the attainment of the objects of the union.

The principal purpose of the union is freedom of trade amongst the States, and accordingly freedom is established by the Constitution; Parliament is to have power to regulate trade under that governing principle; and, for better security, Commonwealth and State Parliaments are forbidden to do anything in derogation of freedom. In matters of finance, the adjustment of obligations between the parties was in Canada and Australia alike the principal practical difficulty in effecting union; and common prudence would insist upon securities against the diversion of the assets of one State to meet the burdens of another, and for equality of treatment. Here of course each Colony was concerned to make the best bargain it could; and it would be reasonable that the financial arrangements should be protected from alteration, not merely by Parliament, but by the Commonwealth itself. This, in fact, is what is done in Canada, where the Dominion contribution to the provinces is unalterable save by the Imperial Parliament. But in Australia the Commonwealth Parliament has a freedom of action which is remarkable. For section 87, providing for the return to the States of three-fourths of the revenue raised from customs and excise, which Mr. Lefroy (p. 291) regards as fettering the power of Parliament and indicative of distrust, is limited to a period of ten years; and by section 94, 'after five years from the imposition of uniform duties of customs, the Parliament may provide on such basis as it deems fair for the monthly payment to the several States of all surplus revenue of the Commonwealth.'

Mr. Lefroy (p. 285) calls special attention to the terms in which the powers of direct taxation are conferred upon the Parliament, as illustrating the intention of the Constitution to control legislative discretion. The history of that very power illustrates in the best possible way my criticism that such restrictions are—unlike so many constitutional limitations in America—imposed merely for federal and not for national purposes, as part of the bargain between the States, and not for the protection of the citizen against the Government. The power in question is to make laws with

respect to taxation, 'but so as not to discriminate between States or parts of States.' Mr. Lefroy compares this with the provision in the United States Constitution relating to duties, customs and excise, and declaring that they shall be uniform throughout the United States; and, as a matter of fact, the power in the earlier drafts was in the same terms as are in the United States Constitution. But it was pointed out that 'uniform throughout the Commonwealth' was more than a geographical limitation, that it did more than protect the States against discrimination, and required that individuals should be taxed on the same basis, so that probably Parliament would be prevented from imposing a graduated system of taxation (see the Income Tax Case—*Pollock v. Farmers' Loan and Trust Company*, 157 U. S. p. 429). The restriction went beyond what federalism required, and it was accordingly altered into the form in which it at present stands.

The provisions of the Constitution requiring that separate taxation proposals should be presented in separate bills, and that bills appropriating revenue should be separated from taxation bills, are equally to be attributed to the federal character of the instrument. They are intended merely to secure that the Senate, the House of the States, shall be free to exercise its power of rejecting any financial proposal without fear of 'tacking' by the Lower House.

In the Federal Constitution, safeguards are set up for the protection of the States where it is thought likely that they may be attacked. Certainly the Canadian Constitution is no exception to the rule. In all its essential points it is under the guarantee of the Imperial Parliament, by whom alone it can be altered. The rights of nationalities are guarded in the B. N. A. Act, 1867, by the provision of section 133, that either the French or English language may be used in the Legislature and in judicial proceedings, and that Acts of the Dominion Parliament and the Legislature of Quebec shall be printed in both languages. The rights of religions in matters of education are protected by the elaborate provisions of section 93; while State rights and professional rights are alike respected in sections 97 and 98, under which the judges in each province are to be appointed from the bar of that province.

Finally, it must be observed that for signs of distrust we should look to the restrictions upon State Legislatures as well as to those on the Central Legislature. In Canada such distrust was manifested by the fundamental provision that the Provincial Legislatures should be entrusted only with specific matters, and should even in those matters be subject to Dominion control. In the United States the State Legislatures are limited in every direction

by the United States Constitution and the State Constitution. In Australia the State Parliament will enjoy a fullness of legislative power unknown in either the United States or Canada. It has the residuary power, and it is subject to no control from the Commonwealth authorities.

Privileges of Parliament.—Mr. Lefroy incidentally mentions (p. 284) that the restriction on the power of the Canadian Legislature to define its own privileges has never been satisfactorily explained. The restriction in the B. N. A. Act, 1867, § 18, no doubt comes from the Victorian Constitution Act of 1855, § 36 of which contains a proviso that ‘no such privileges, immunities or powers shall exceed those now held, enjoyed and exercised by the Commons House of Parliament, or the members thereof.’ The substance of that restriction is contained in the Draft Bill of the Legislative Council of Victoria, by which it was provided that ‘all the privileges, immunities and powers now held, enjoyed and exercised,’ &c., should be enjoyed by the Legislative Council and Assembly in Victoria and their members. The South Australian Act of 1855–6 copied the Victorian section; and just as the Australian Constitutions of 1855 borrowed in many respects from the Canadian Constitution of 1841, it is reasonable to suppose that the framers of the Act of 1867 turned to the Australian Constitutions. As I have been speaking in this article of distrust of Legislatures, I may observe here that the one power of the Legislatures which does appear to arouse some popular dislike in Australia is their privilege.

W. HARRISON MOORE.

THE HISTORY OF THE PATENT SYSTEM UNDER THE PREROGATIVE AND AT COMMON LAW.

A SEQUEL.

WITH the present essay the tale of the Elizabethan monopoly patents is resumed and completed. Apart from their industrial value, a twofold interest attaches to these grants. In the first place, so far as this country is concerned, they are indubitably *primae impressionis*, for no such licences are recorded on the Patent Rolls of an earlier age. In the second place, the general policy of the monopolies is found to conform strictly to the type recognized as admissible by the common law, of which the Statute of Monopolies conveys a condensed and imperfect summary. In other words, the effect of the statute is essentially to confirm the practice of the Crown during the period A.D. 1561-1603.

In a former article we endeavoured to establish a connexion between the mediaeval policy of the encouragement of new industries and these early grants of Elizabeth. To this analysis we have now to add that the monopoly clauses, by which the latter system is distinguished from its forerunner, appear to have been borrowed from continental precedents, where the industrial privileges followed close upon the heels of the printer's copyrights¹. Unlike the continental system, however, the Elizabethan monopolies are broadly based upon considerations of the value of industry to the realm.

To qualify for this privilege the applicant undertakes to introduce at his own cost a new manufacture, the knowledge of which he has attained either by the procurement of foreign workmen, by travel, or by experimental research. The grants here chronicled have been annotated chiefly from the standpoint of their constitutional merits. The motives moving the Crown, the rents reserved, the powers conveyed to the grantee, and the history of the use and abuse of these powers are briefly set forth. For convenience of reference and for statistical purposes, patents of reissue have been treated under the date of the original grant, and are counted as forming a single grant.

¹ The earliest industrial monopolies are to be found in Venice circa 1500. The system was carried thence by refugees from that state to the Netherlands and England.

- No. XXIII. 1568. Oct. 14. Grant to Peter Backe to collect madder in Ireland and dye skins of animals [for 21 years].

Backe was a native of Brabant—a province noted for its dyers. The English dyers, on the other hand, bore an evil reputation. 'No man almost wyll meddle with any colours of cloth touching wodde and mader, unlesse it beare the name of French and Flaunders dyes, for reason of the deceits practised by the English and the ignorance of the principles of their craft' (Camden Miscellany). The grant (which should have been included in the list of grants A.D. 1561-70¹) covers all parts of Ireland, with special reference to specified counties. Infringement is punishable by one year's imprisonment. Probably the first Irish monopoly grant.

- No. XXIV. 1571. July 5. Grant to Sir Thos. Goldinge for an engine for land drainage and water supply [for 20 years].

The grant recites the condition of the lowlands and the need of a proper system of water supply for municipal and industrial purposes. The engines, once erected, will continue working without men's labour. The grant is void if the engine be not erected within two years or fails to work efficiently as set forth. The petition appears in S. P. Dom. vol. 127, under the incorrect date 1578.

- No. XXV. 1571. July 30. Grant to Rd. Mathewe to make 'Turkye haftes' for knives, &c. [for 6 years].

The grantee obtained his information by residence abroad. The patent was contested successfully by the London cutlers (*Matthey's case*), apparently on the ground of 'general inconvenience' of patents of improvements in an existing trade. The text and history of the grant will be found in Edmunds, 2nd ed., p. 885.

- No. XXVI. 1571. Sept. 1. Grant to Rd. Dyer to make earthen pots to hold fire for seething meat [for 7 years].

According to Howes the grantee learned the art of making 'earthen furnaces, firepots, and ovens transportable' when a prisoner of the Spaniards (Portuguese?). The grant covers London and a three-mile radius. The industry was carried on 'at London without Moorgate,' and the patent was extended for seven years on January 28, 1579.

- No. XXVII. 1573. June 13. Grant to John Payne for mills for grinding corn [for 21 years].

The grant is for modified forms of hand and treadmills, examples of which had already been erected at Glastonbury. The petition addressed to Burghley with 'a plat of my worke, the fyrst I ever made,' is preserved in the Lansd. MSS. Prior rights of millowners reserved. This is undoubtedly a native invention of considerable merit. As in some other cases, protection is sought in view of threatened unauthorized imitation of the invention.

¹ LAW QUARTERLY REVIEW, xii, pp. 145-150.

No. XXVIII. 1573. July 8. Grant to John Synertson to put in practice an instrument for land drainage, and for the stopping of breaches in dams [for 10 years].

The grantee is described as of Amsterdam, stranger. Prior rights are reserved, and a term of two years assigned for introducing the industry.

No. XXIX. 1573. Oct. 28. Grant to Rd. Candish for an engine for draining coal and iron mines [for 20 years].

The grant covers all engines invented or to be invented by the grantee within this term, and extends to eight counties. Prior rights are reserved, but no term is fixed for working, owing probably to the invention being in the experimental stage.

No. XXX. 1574. April 3. Licence to John Collyns to make 'brode clothes called Mildernix and Polledavies' [for 21 years].

The subject of the grant is the manufacture of sailcloths, hitherto brought from France. The grant recites that the art had been introduced and apprentices educated therein, and proceeds to confine the trade to Ipswich and Woodbridge under the supervision of the patentee. On February 5, 1590, the grant was reissued to John and Rd. Collyns for twenty-one years. Cf. also Statute 1 Jac. I, cap. 24, where the above statements are confirmed.

No. XXXI. 1574. Aug. 27. Grant to Jeremy Nenner and George Zolcher for a method of sparing fuel [for 7 years] (Latin).

The grantees are bound to erect within one year a trial installation and to prove its efficacy. The invention appears to relate to a method of domestic heating by a system of flues connected with a central furnace, and to have been adopted in practice by brewers and others (Acts of the Privy Council, April 27, 1578).

No. XXXII. 1574. Dec. 13. Grant to James Verselyn for making drinking glasses [for 21 years].

The grant is made on the strength of works already erected at Crutched Friars, and aimed at superseding the trade in Italian glasses. Importation of foreign glass is prohibited, and the relations between the retail trade and the grantee regulated. In 1592 Verselyn surrendered the grant in favour of Sir Jerome Bowes, to whom a patent of twelve years was issued. Under this grant a rent of 100 marks is reserved to the Crown. For the further history and text of the grant cf. *Antiquary*, March, 1895, et seq., where the story of the grant is traced down to the final reissue to Mansel.

No. XXXIII. 1575. Feb. 14. Grant to Sir Thos. Smythe, the Earl of Leicester, Lord Burghley, and others of the 'Society of the New Art,' and to their successors.

Strype's *Life of Smythe* contains an account of this extraordinary undertaking, which was for the transmutation of iron into copper, and of

lead and antimony into quicksilver. After several failures at Winchelsea, further attempts were made at Anglesea, where possibly some success was met with by the deposition of copper on iron rods laid in the copper-bearing waters of the district. The grant, or charter of incorporation, which is based on the invention of one Wm. Medley, illustrates the state of the native metallurgical science at the period.

No. XXXIV. 1577. June 8. Grant to Wm. Wade and Henry Mekyns, *alias* Pope, for making sulphur, brimstone, and oils [for 30 years].

A reissue of grant XI. Wm. Wade succeeds to the rights of the late Armigil Wade and introduces Mekyns, a London jeweller, as a capitalist prepared to spend large sums in extending the industries. By this grant it is proposed to substitute the use of vegetable oils extracted by the patentees for train or whale oil in soap-making and dressing cloth. The use of fish oil in the soap manufacture was prohibited in the following year (Acts of the Privy Council, 1578). There is a proviso that the quantities of rape and other oils made under the grant shall not be below that of the train oil entered in the London Customs' books during the last three years. With regard to the extraction of sulphur from mineral sulphides the Crown secures a rebate of one-twelfth below market prices. Note generally that this and other patents of reissue are open to objection on the ground of the 'unreasonable' extension of their term and the undue enlargement of powers conveyed in the original grant.

No. XXXV. 1578. Jan. 24. Grant to Peter Morris for engines for water-raising [for 21 years].

The text and history of this important grant will be found in Antiquary, Aug.-Sept. 1895. The patentee was of Dutch extraction. The grant reserves prior rights and fixes three years for the introduction of the invention, which comprised the first application of the force-pump to water-raising in this country, and led almost immediately to the introduction of the manual fire engine. On the continent the application of the force-pump was well known at this period.

No. XXXVI. 1582. June 26. Grant to Rd. Spence to make white salt [for 20 years].

The patentee undertakes to introduce the industry and to supply a better salt at cheaper rates. Two years are fixed for this purpose. A rent of £10 is reserved to the Crown.

No. XXXVII. 1582. Sept. 22. Grant to Wm. Harebrowne and his son to make salt upon salt at Yarmouth [for 21 years].

The process consists of blending white Spanish salt with sea salt, and the product is applicable to fish-curing. The grantees were recommended by the Bailiffs and inhabitants of Yarmouth. The grant is made in part 'for the relief of the decayed state' of the Harebrownes' fortunes occasioned by losses at sea, and is revocable if found inconvenient to the town or common-weal.

No. XXXVIII. 1583. April 10. Grant to Geo. Langdale to make sackbuts and trumpets [for 20 years].

The patentee is described as 'one of our Trumpeters.' The grant covers all future improvements, regulates prices, and reserves the right of one Peter Grinn, 'who has heretofore mended trumpets.' The grant extends to London and a seven-mile radius.

No. XXXIX. 1584. Feb. 28. Grant to James Humfry to make train oil [for 7 years].

The grant recites that the patentee, a citizen of London, had for over twelve years practised and devised to make very good train oil from the livers of fishes imported from the north seas, and had erected houses and furnaces for the purpose. The uses of the oil are stated, and a rent of 20s. reserved to the Crown. The grant was reissued for ten years on May 1, 1591, to Richard Matthews, Yeoman of the Pantry; and again to his widow for twenty-one years. There can be no doubt as to the irregularity of these reissues, the first of which was opposed by the shoemakers and others of Scarborough. The industry existed for many years at Southwold.

No. XL. 1585. Sept. 1. Grant to Thos. Wilkes, Clerk of the Privy Council, to make white salt [for 21 years].

Under the original grant the industry is confined to Lynn Regis and Boston. A rent of £6 6s. 8d. is reserved and immediate prosecution of the industry insisted upon. The patent was extended on Feb. 20, 1586, to Kingston-upon-Hull. On Aug. 31, 1599, the grant was surrendered in favour of John Smithe for the remainder of the term, and a new grant was issued in consideration of the payment by the latter of two sums of £4,750 and £2,250, apparently due to the Crown by one Robert Bowes, of Berwick, deceased. In defiance of the terms of the grant, which regulated prices by those of London (with a maximum price of 20d. a bushel), Smithe raised his prices to 14s. and 15s., and was thereupon committed by the Lord President, and the old prices restored. The salt was manufactured under a sub-contract by Sir George Bruce, a colliery owner at Culross, who subsequently petitioned for a renewal of the licence in 1611, offering to reduce the price of salt to 16d., or 2d. less than the London prices, and stating that he employed over 1,000 workmen.

No. XLI. 1586. March 11. Grant to Francis Dal Arme (alien), and Robert Clarke, to work out oil of woollen cloth, with consent of the owners—'the same oil to have for their labour' [for 21 years].

The grant insists on the instruction of any member of the public for a reasonable recompense, of which one-tenth is reserved to the Crown. Trial of the invention is to be made before the Privy Council, and the grant is void if the cloth is injured in the process.

No. XLII. 1587. Dec. 30. Grant to John Purchase, 'our subject,' to make armour and harness for man and horse [for 7 years].

The subject of the grant is a light bullet-proof fabric without any metal 'mingled or wrought in the same.' The trademark is to be a half-moon, suggestive, as in Mathewe's patent, of an Eastern origin. Probably a revival of the Saracenic defensive felt armour.

No. XLIII. 1588. April 15. Grant to Rd. Young to import, make, and sell 'le starche' [for 7 years].

The grant was reissued to Sir John Pakington for eight years on July 6, 1594, and again to the same individual on May 20, 1598. The consideration stated is the annual rent of £40, but the real consideration of the grant is the suppression of the manufacture of starch from grain—the patentee being confined 'to bran of wheat.' The grant of the trade was clearly illegal. As an instance of gross oppression by the patentee we may cite Hatfield MSS. 4, p. 261, where an individual appears to have been imprisoned by Pakington for selling starch bought under Young's patent. Pakington appears to have undertaken to pay certain pensions to certain Dutch women whose names are connected with the introduction of starching into England (ib. p. 614).

No. XLIV. 1588. July 26. Grant to Timothy Bright, M.D., of a short and new kind of writing by character [for 15 years].

The grant is to teach, print, and publish works in shorthand. In the Lansd. MSS. there is a letter in favour of the system, with the Epistle to Titus enclosed as a specimen.

No. XLV. 1588. Dec. 4. Grant to Bevis Bulmer to make and cut iron into small pieces to work out nails [for 12 years].

There is reason to believe that the invention was of foreign origin, although it is stated that Bulmer 'is the first inventor and publisher within the realm.' Bulmer was a good mechanic and mining engineer, whose services were in demand in all parts of the kingdom.

No. XLVI. 1589. Jan. 28. Grant to George and John Evelyn and Rd. Hills to dig and get saltpetre [for 11 years].

The grant is described as 'our letters of commission for the making of saltpetre,' and is made in consideration of a great quantity of corn powder to be delivered to 'our store within the Tower.' A new grant, drawn by Coke, on Sept. 7, 1591, was made to Evelyn and others, annulling all earlier grants. The constitutional nature of the saltpetre grants was admitted by the Statute of Monopolies, but the practice was objectionable, owing to the inquisitorial powers and right of entrance upon lands conveyed by these grants.

No. XLVII. 1589. Feb. 7. Grant to John Spilman to buy all manner of linen rags, &c., to make white writing paper [for 10 years].

The grantee, an alien, held the office of Jeweller to the Queen. The grant is possibly connected with the petition of Rd. Tottyll, the Elizabethan

law publisher, who in 1585 stated that the French, by buying up all the linen rags in the kingdom, had thwarted his efforts to introduce the manufacture. The industry was established by Spilman at Dartford, where he employed over 600 workmen. The grant prohibits the manufacture of brown paper, and is void if the former manufacture be discontinued for six months. On July 15, 1597, the patent was reissued for fourteen years with the same proviso, but covering the manufacture of all kinds of paper. The text of the original grant and the petition of Tottyll will be found in Arber's *Registers of the Stationers Company*, i. 242, ii. 814.

No. XLVIII. 1589. Oct. 9. Grant to Thos. Procter, of Marske, Yorkshire, and Wm. Peterson to make iron, steel, and lead by using earth coal, sea coal, turf, or peat [for 7 years].

The consideration of the grant is the economy of fuel, of which one load would be required in place of four per ton of iron. Various small royalties are reserved to the Crown.

No. XLIX. 1590. Oct. 15. Grant to John Thorneborough, Dean of York, for the refining of pit coal [for 7 years].

The object of the invention is to overcome the popular objection to the unsavoury fumes of coal used in the imperfectly constructed hearths of the period. A royalty of 4*d.* per chaldron on the refined coal for domestic use and 8*d.* per chaldron on the exported coal is reserved, with the usual exception in favour of users of old processes.

No. L. 1591. Nov. 4. Grant to Reynold Hoxton to make flasks for touch-boxes, powder-boxes, and bullet-boxes for small-arms [for 15 years].

Apparently a form of wooden cartridge containing powder and shot, and facilitating the loading of firearms.

No. LI. 1594. March 23. Grant to Richard Drake to make aqua composita, aqua vitæ, and vinegar [for 21 years].

This grant may be regarded as typical of the Elizabethan monopoly system at its worst. It recites that about thirty years past strangers and others had substituted beer in the manufacture of the above liquors and 'sauces'; but that of late certain covetous makers had further employed such 'corrupt, noisome, and loathsome stuff' that a reformation of the abuses was urgently required in the interests of the public health. The grant proceeds to invest in Drake the sole manufacture of the ale to be employed—such ale to be sold at London rates, with a rent of £20 per annum reserved to the Crown. Drake was further charged with the suppression of all vinegar, &c., sold in casks not bearing his own trademarks. At the last moment, 'when the grant was fully passed,' Lord Burghley intervened, and insisted upon the insertion of clauses reserving the rights of those manufacturers who employed wine lees in the manufacture, together with those of the makers of vinegar for domestic uses and charitable purposes. Wales is

also excepted from the grant. The exaggerated recitals in the grants excited notice at the time; cf. Harrington, *Metamorphosis of Ajax*, and the *Case of Monopolies*. For the abuse of the grant cf. D'Ewes, 644, and the Lansd. and Harl. MSS.

No. LII. 1597. July 22. Grant to Thos. Lovell to inne, fence, win, drain, and recover all grounds, &c., and to make turf or peat fit to be burned [for 21 years].

The inventor learned the art from the Dutch, and undertakes to introduce skilled labour from abroad.

No. LIII. 1598. April 21. Grant to Edward Wright to make and utter mathematical instruments [for 8 years].

Another water-raising device, obtained 'by long and painful study of the mathematical sciences' by the petitioner, a Cambridge Master of Arts. It is stated 'a special work' for supplying water to London had already been undertaken by the patentee. Prior rights reserved.

No. LIV. 1598. Aug. 11. Special licence to Edward Darcy for transporting cards and for making them [for 21 years].

A patent for the sole importation of playing-cards had been granted (18 Eliz. p. 1) to Ralph Bowes and Thomas Bedingfield, and in 1578 John Acheley, of London, was called upon by the Privy Council to answer by what authority he presumed to manufacture and sell playing-cards notwithstanding the above patent. Acheley replied that his doings were lawful, 'grounding himself upon the laws of the realm.' The legal points were thereupon referred to the Master of the Rolls (Sir Wm. Cordell) and the Attorney-General († G. Gerrard), praying them to take some pains and certify their opinion, that such order may be taken as shall be agreeable with justice and equity. Their lordships, however, hint that a composition between the parties would be an acceptable termination of the dispute, as 'Acheley doth by his cardmaking set manie personnes on work which by the inhibition of his profession would otherwise be ydele.' In 1579 and 1580 further action was taken against other parties who had imitated the seal of the patentee with a view to avoid detection. In 1589, on the complaint of Bowes, the Privy Council ordered that the grants be maintained according to the contents thereof, and that hereafter infringers shall not only be taken to prison until sufficient security has been provided, but shall also have such tools, moulds, or other instruments taken away, broken in pieces and defaced. For the further history of this celebrated grant see Gordon, *Monopolies by Patents*, where the various reports of the *Case of Monopolies* are edited and annotated.

No. LV. 1599. July 11. Grant to Capt. Thos. Hayes for making of instruments of war [for 10 years].

A military 'holdall,' yecept a portsack, to contain a spade, a mattock, a hatchet, a saw, and not omitting an anvil and fourteen days' victuals. There is a proviso that the requirements of the Crown shall be supplied. In 1604 the patentee notified his intention to present the above invention to the Crown, offering the master of the Ordnance £2,000 if he could get the portsack introduced into the southern counties.

The results of the industrial policy of the reign may now be presented in tabular form :—

Period.	Alien Grants.	Native Grants.	Grants for regulating Trade.	Total.
1561-1570	15	8	0	23
1571-1580	4	7	1	12
1581-1590	2	11	1	14
1591-1600	0	4	2	6
1601-1603	0	0	0	0
1561-1603	21	30	4	55

The first column of our classification comprises grants for new industries and inventions to aliens or naturalized subjects of the Crown. With these we find occasionally associated a native, acting as interpreter and intermediary between the foreigner and the public. The figures for the period 1571-90 indicate the development of native enterprise, although the industries still bear the impress of foreign suggestion.

An attempt to further illustrate the growth of the native inventive talent by subdividing these figures into grants of importation and invention proved impracticable owing to the want of definition in the phraseology descriptive of the relation of the patentee to the subject of the grant. It is clear that the modern distinction between invention, discovery, and the acquisition of knowledge by other than mental effort had no existence in the language of the sixteenth and seventeenth centuries. The terms 'invention,' 'discovery,' 'first finding out,' &c., are used indiscriminately, not only on the Patent Rolls, but in the literature of the period. For instance, in the translation of the well-known work of Polydore Vergil, *De inventoribus rerum*, under a chapter headed 'Who found out Metals?' we are told that 'Eacus invented it [i. e. gold] in Panchaia,' and again that the Justinians, a religious order, were 'invented [i. e. founded] by Lewis Barbus.' Later, in Bacon's *Kalender of Inventions* (*Adv. Learning*, II, chap. viii, sect. 7), in the same line with the modern use of 'invention,' we find the phrase 'invention of causes' used to express the discovery of principles. And this indifferent usage of terms is well illustrated from the Patent Rolls by Lovell's grant, which recites that the grantee by certain practices, experiments, and devices first invented, devised, and found out in parts beyond the sea, where he gained his experience, certain works called in Dutch 'boggerringe' to bring which invention (*sic*) to good effect the grantee undertakes to

bring skilled workmen from abroad, &c. To this point we shall refer below in considering the proper interpretation to be put upon the phrase 'true and first inventor' in the Statute of Monopolies.

The Statistics for 1591-1603, which indicate a practical reversal of the favourable attitude of the Crown toward the inventor, afford a fair criterion of the industrial value of the Elizabethan patent system. During this period we have to record the rejection of the suits for protection of the following inventions:—(a) The stocking frame of Lee—the most original invention of the age, which for lack of encouragement went to France, where the inventor is stated to have received a privilege; (b) the water-closet of Harrington¹, which was reintroduced about a century and a half later; (c) a scheme of Genibelli² for land reclamation; (d) various devices of the ingenious Hugh Platt, in part of foreign origin; (e) Stanley's invention of armour plates; and (f) a scheme for sugar-refining, the novelty, however, of which was questioned.

The stringency, therefore, of the attitude of the law officers³, though not without justification, served no useful end; for their influence was insufficient to secure the rejection of the three worst patents of the reign, viz. for starch, vinegar, and playing-cards. The effect of these grants was to remove the industries concerned to the category of dangerous trades, the future exercise of which could be permitted only under State regulation. Obviously, a policy of this description was one capable of indefinite extension, and which threatened to fasten itself permanently on the industrial system. It is not, therefore, surprising to find that the agitation against the monopolies and other licences of Elizabeth which had found its expression in the sessions of 1566, 1571, and 1575 (D'Ewes, Journal, 115, 158-9, 244, 254) had in 1597 assumed a new and dangerous form. An analysis of the list of grants submitted

¹ Harrington thus records his protest: 'I hear by report there is a worthy gentleman sometime of our house (of Lincoln's Inn) that hath now the keeping of the Great Seal, and they say (see our illhap) he hath ever been a great enemy to all these paltry concealments and monopolies; and further they say of him that to beguile him with godly shews [i. e. false recitals, as in the vinegar patent, referred to by Harrington] is very difficult, but to corrupt him with gifts is impossible. Let us then make a virtue of necessity, and sith we cannot get these monopolies, let us say we care not for them and a vengeance on them that beg them. . . . And if Mr. Plat will follow my advice he shall impart his rare devices gratis, as I do this, and so we may one day be put in the chronicles as good members of our country,' &c. (Metam. Ajax, 1596.)

² Genibelli, the inventor of the fireships which but for the folly of the Dutch had saved Antwerp from Parma. After the fall of Antwerp he entered the service of the queen—his reputation once more serving the country in good stead, when the fireships of Hawkins drove the Spanish ships from their anchorage at Calais.

³ The reference of the petition to the law officers for their report was probably introduced about this date. Formerly the business of the monopolies had been settled between the Queen and Cecil and the petitioners, sometimes after protracted negotiation.

to the Committee of Grievances in 1601 affords the best clue available of the real objective of the reforming party. The list resolves itself into three classes of grants, the relative strength of which is given only approximately :—

(A) Dispensations (15), or grants with a *non obstante* clause, including licences (a) to traffic in forbidden articles, (b) to perform acts prohibited by the penal statutes, (c) offices delegating to an individual the dispensing power of the Crown in respect of a given statute; (B) copyright patents (7); (C) industrial monopolies (7).

A comparison of these figures with the reforms effected by the statute of 1623 reveals some curious results. The prerogative of the Crown in regulating foreign trade by its letters patent is of great antiquity. In this respect the commercial licences of Elizabeth can be paralleled on the Patent Rolls of any of her predecessors. Equally grounded in antiquity is the exercise of the dispensing power, in suspending the operation of a statute, or in making exceptions in favour of an individual (Stubbs, ii. 572; Gordon, *Monopolies*, 233). The delegation, however, of the dispensing power to an individual was a monstrous development of the constitutional theory. Yet all these powers, constitutional or otherwise, were summarily swept away by an Act professedly declaratory of the common law. The explanation of the apparent paradox is not far to seek. The reign of Elizabeth is as remarkable for the development of trade in the hands of the native joint-stock companies as it is for the general extension of industry outside the limits of the guilds. In former reigns the royal licences primarily affected bodies of alien merchants, domiciled in the realm, but subject only to Crown control. But now that the bulk of the trade was no longer engrossed by the foreign element, the practice of the Crown was found inconvenient¹. In the trial of strength which took place between the two parties in 1601, the queen by her adroit appeal to the Commons contrived to secure the honours; but in the following reign the whole case for the Crown was ignominiously surrendered. On the first count, therefore, the Commons secured under the colour of a redress of grievances a substantial addition to their common law rights, both as an industrial and trading community. As regards the copyright patents, the exception of these grants from the purview of the statute may be placed to the credit of the Crown.

The immediate effect of the statute on the patent system has been variously estimated. Regarding the statute from the standpoint of patent law, and apart from the remedies provided against

¹ So far as the native agricultural or industrial interests were concerned these export licences must have tended to enhance prices by diminishing the available stock within the realm.

the abuse of the patent grant¹, it is contended that in one respect alone was any innovation intended upon the existing practice. In the argument of Fuller in *Darcy v. Allin*, and in the *Clothworkers of Ipswich* case, the limitation of 'a certain' or 'reasonable time' is asserted as a condition of a valid patent. Here the statute provides the necessary definition by limiting the grant to the term of fourteen years or under, and further inhibits the Crown from the extension of the term by the grant of subsequent patents of re-issue. In other respects, it is submitted, the statute must be interpreted as recapitulating limitations already assigned by the common law, which limitations in their turn, as we now propose to establish, are such as were commonly prescribed in these grants for the purpose of safeguarding the powers with which the grantee was thus invested. This may be established under the following headings:—(a) The consideration of the grant, (b) the patentee, (c) subject-matter, (d) novelty. To avoid the possibility of misconception, however, it should be stated that the expression of the following views is confined strictly to the construction of the statute at the date of its enactment, and has no reference to the subsequent development of modern patent law.

(a) The consideration of the patent grant is not expressly stated in the statute, unless the words 'for new manufactures' be expanded into 'for [the introduction of] new manufactures.' Following the general rule which governs the interpretation of a declaratory Act, it would appear that the language of *Darcy v. Allin* and the *Clothworkers of Ipswich* case amply corroborates the above hypothesis, which is of course primarily based upon the evidence of the patent grants.

(b) The patentee. The meaning of the 'true and first inventor' has already been foreshadowed. It is submitted that the Act introduces no new definition, but emphasizes the fact that the class described under the above phrase are the sole legally qualified recipients of this privilege, to the exclusion of third parties, viz. the Court favourites. The development of the language has since narrowed the connotation of the term 'inventor' to exclude the individual 'who by his charges and industry,' or 'who in peril of his life or consumption of his stock and estate,' has brought in a new manufacture. Regarding, however, the definition from the more elastic standpoint of the period,

¹ The Act here prescribes a change of venue. The Crown customarily referred all disputes to the Privy Council. This jurisdiction was now abolished. The right, however, to challenge the validity of these grants in the courts of law had been conceded and exercised prior to the statute. Yet notwithstanding the statute, the Stuart dynasty continued to uphold the jurisdiction of the Privy Council, both in practice and by direct reference in the patent grant.

it is submitted that the position of the importer need no longer be accounted an anomaly, not to be explained by the ordinary rules of patent law (cf. Edmunds, 2nd ed., p. 266). On the other hand, acceptance of these views entails an admission that 'invention,' i.e. the exercise of the inventive faculty, is not required under the common law.

(c) Subject-matter. The subject of a grant must be a 'new manufacture,' i.e. an art 'substantially and essentially newly invented,' not merely an improvement upon an existing art. Coke's illustration is supported by the decisions given in respect of the patents of Mathew (XXV, *Matthey's* case) and Schutz (XIV, the *Mendip* case); but the practice of the Crown, which was more liberal than the construction of the Courts, has prevailed.

(d) Novelty. The definition of novelty in the statute is precise, and must not be confounded with the foregoing. It runs, 'which others at the time of making such letters patents and grants shall not use.' The definition is still preserved in the modern application form, and is recited in the patent grant—the applicant affirming that 'the invention . . . is not in use by any other person, to the best of his knowledge and belief.' As is well known, evidence of prior user is 'the best evidence you can have' (*Plimpton v. Malcomson*). This doctrine, however, is ultimately based upon the clauses reserving the rights of prior users; of which we append the earliest instance on the Patent Rolls, viz. in 1562: 'Provided always that every man may in this mean time use the old manner of scouring and making clean of havens and channels or any other of their own invention, being not made like to this engine, &c., as they might have done before.' Under the practice, therefore, both of the Crown and statute the test of novelty is limited by the practice of the art, or prior user within the memory of man.

To harmonize the divergent results suggested by a comparison of the contemporary construction of the statute with that of modern times falls without the limits of the essay. For a partial solution of the difficulties the writer may refer to an earlier contribution to this REVIEW (July, 1897) dealing with the history of the introduction of the patent specification, an innovation which, by shifting the consideration of the patent grant from the practice to the exposition of an invention, substantially relaid the foundation of patent law in the latter half of the eighteenth century.

E. WYNDHAM HULME.

THE LAW OF PRODIGALS¹.

ENGLISH law is, more or less, purely Teutonic, with very little Roman law intermixed. The result of this is that our law differs from systems derived from the Roman law in some curious respects, and sometimes whole branches are wanting. A striking instance in which English law differs from systems derived from the Roman is the married woman's property law; and when we come to deal with Continental law so far as it deals with prodigals, we find we have no corresponding chapter in our English legal system.

During the last three or four years certain titled prodigals have led thoughtful persons to think that it is rather a pity that we have no law on the subject. While this has been going on in England, Continental legislators have had to discuss the subject in codifying the law. It therefore occurred to me that it would be interesting to describe shortly the rise of the law of prodigals in Roman law, and to sketch the law as it is in Continental nations, and afterwards to discuss on general principles whether it is desirable or not to have some similar legislation in England.

As England has always been the country where individual liberty has been respected more than anywhere else, so also no attempt has been made to restrain a prodigal.

The ordinary Englishman's notion of such legislation is that it is 'grandmotherly'; but during the last thirty years the tendency has been to interfere with individual liberty in a way which would have made Mill, and philosophers of his stamp, exclaim in surprise. Modern science and the current of modern thought have led legislators more and more to consider the dangers to society from giving the individual absolute liberty. Fifty years ago a parent might, or might not, give an education to a child as he wished; he might also live in the most insanitary condition.

It might be argued that legislation dealing with the education of children in spite of their parents was not passed for the purpose of restraining the parents' liberty, but for the sake of the children, who were not of full age, and that factory legislation was passed in the interests of those who were not able to protect themselves—namely, women and children; but the interference with freedom

¹ This essay, in a somewhat more expanded form, was an approved thesis for the LL.D. degree of the University of Dublin.

of contract in Ireland cannot be defended on these grounds, for the legislator was dealing with full-grown men. It will, therefore, be apparent that the English Legislature is prepared to restrain the individual liberty of adults if it can be sufficiently shown that danger arises either to the State or to the individual from not doing so, and we take it that if we can establish the proposition that there is a serious danger to the State or to the individual by not restraining prodigals, the State will be prepared on the same principle to restrain them also.

The tax-payer has clearly an interest in preventing a man and his family from being chargeable if he can do so reasonably, and if he is to be asked in addition to assist in an old age pension fund, he has a still further interest in checking men from squandering their money. If by restraining a prodigal you can avoid his becoming chargeable on the rates, it is surely the concern of society to stop his spendthrift propensities.

If the prodigal happens to own large properties, his prodigality may result not only in his becoming individually chargeable, but also in a large number of persons suffering on account of his recklessness. In the case of entailed estates, the prodigal possessor of them has generally only a life interest; and if he chooses in a few years to anticipate his life interest, the result must be that his creditors will take possession of his life interest. If the property is sold under the Settled Land Act of 1881, the creditor will only have a life interest in the capital sum derived from the sale, and as such capital money must be invested in trust securities, the result will, in the largest number of cases, be to diminish the life income, and therefore the fund to which the creditors will look for payment. The latter will for this reason probably not take this step. If, however, they do, and a rich new landowner takes possession, the tenants will not suffer. But the country alone will suffer through the dissipation in an unprofitable expenditure of one capital, the capital of the prodigal. If the creditors, however, do not take this step, they will practically become the landowners during the life of the spendthrift, and their interest will be to take the maximum out of the land and not act in the way that a generous and interested landlord would. This will mean that no money will be spent in permanent improvements, and the tenants will have an absentee landlord who does not care about their welfare. The spendthrift, therefore, will have caused injury and suffering to a large number of people.

But if the prodigal is not a landlord at all, but merely the owner of shares and stocks, a large amount of wealth will be directed to unproductive consumption, which tends to the im-

poverishment of the country, apart from the moral danger such a person is to all who come in contact with him.

We in England are very insular, and have hitherto done nothing to restrain prodigals, but it is curious to note that the law of prodigality is as old as the early Roman Republic, and modern nations like France and Germany, when codifying their laws, considered the advisability of letting the prodigal take care of himself, and on the balance of advantage, came nevertheless to the conclusion that it was desirable to have a law restraining this vice, both in the interest of the spendthrift and in the interest of the State.

The history of the origin of such laws is attractive, for, as we shall proceed to show, it took its origin not from a desire to protect either the State or the prodigal, but to prevent the prodigal dissipating what was not his, but his family's or his clan's.

But now the question will be asked, Who is a prodigal, and what restraints is it proposed to put upon him? It is as difficult to define what a prodigal is as it is to state what a lunatic is, but for practical purposes it would be no more difficult to ascertain in the concrete case who a prodigal is than it is to determine who is a lunatic.

Justinian says: 'Si talem hominem invenerint qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profudit'—that man is a prodigal (Digest, xxvii. 10 § 1). The French define him as 'l'individu qui dissipe son bien en vaines profusions et en folles dépenses, sans but utile pour lui ni pour la société, et qui, suivant l'énergique expression de l'empereur Antonin le Pieux, "quod ad bona ipsius pertinet, furiosum facit exitum."' And the Germans call those spendthrifts 'welche durch unbesonnene und unnütze Ausgaben oder durch muthwillige Vernachlässigung ihr Vermögen beträchtlich vermindern oder sich in Schulden stecken.' Side by side with the German, it may also be worth while to quote the Austrian definition as supplementing it: 'Dass das Gericht denjenigen als Verschwender erklären müsse, von welchem nach Untersuchung offenbar wird, dass er sein Vermögen auf unbesonnene Art durchbringt, und sich oder seine Familie durch muthwillige oder unter verderblichen Bedingungen geschlossene Borgverträge künftigem Nothstande preisgibt.'

No doubt if the interdiction of the prodigal could be traced back to quite primitive times, it would probably be found to have its origin in some tribal customs.

When we first come across the law of prodigals it was not directed against extravagance as such, nor to protect the State, but to protect property, which was really common property, from

the extravagance of the person who actually had possession of it—in other words, to protect the property rights of innocent third parties. The laws of prodigals in early Roman times only applied to those who were members of a gens, patricians it is true, but not because they were patricians, but because the property was not the prodigal's, but the property of the gens.

The gens was a 'kinship association' and had a family unity which was further strongly cemented together by their common worship and sacrifice. The preservation of the family estates was a matter of great importance to the gens, and was always uppermost in the minds of Roman law-makers when enacting any new law, and it was the principle which guided them in drawing them up. Property which a member of the gens had as such was inalienable and hereditary, and all the members of the gens had an interest in it. Hence we cannot wonder that anything which tended to dissipate it was viewed with great disfavour, and that no measures were thought too strong to put an end to what was a crime in the eyes of all.

It was a condition necessary to interference that the estate which was being wasted had passed into the hands of the prodigal by intestate succession. The custom or law as it existed then did not take into account property which had been directly bequeathed to any person, because the agnates and gentiles were supposed to have lost their rights by virtue of the will of the deceased, and no one had any power to interfere with the liberty of the prodigal if an estate had succeeded to him in this way. It is interesting to note here in passing that freedmen were entirely exempt from this law, because in the eyes of the law a freedman had neither father nor mother.

As the law was devised to safeguard the interests of the family, and as the persons interested were the presumptive heirs—i.e. the agnates and gentiles—the guardian was of course chosen from amongst them. As a general rule the guardianship devolved on the nearest agnate or agnates with two notable exceptions: children could never be appointed to be guardians of their father (*Digest*, xxvii. 10 § 1); and women were disqualified from acting in that capacity. The authorities are divided as to the manner in which interdiction came about, the reading of the ancient texts being rather obscure, but the more likely method (*Delaporte, La Condition du Prodigue, &c.*, pp. 37, 38) seems to have been that it took place by a decree of the magistrate after a formal complaint lodged by the agnates which detailed the acts of prodigality committed by the spendthrift. An inquiry was opened by the judge, and if the charges were declared well founded the praetor

pronounced judgment of interdiction against the accused in the formula preserved by Julius Paulus: 'Quando tibi bona paterna avitaeque nequitia tua disperdis, liberosque tuos ad egestatem perducis, ob eam rem tibi ea re commercioque interdicto.' Once the sentence was delivered on the prodigal, the management of the estates, which he had derived by intestate succession, passed into the hands of the guardian, and the 'condemned' man was not only unable to enter into a contract (*mancipatio*), but was also by law incapable of making a will. A will made previous to interdiction was, however, valid.

The decree of interdiction left the prodigal, however, full powers to deal with any property which he acquired by trading or from some other source.

The guardianship could be ended in several ways: by the decease of the guardian; by loss of Roman citizenship, &c.

In the second period, which roughly speaking may be said to be in classical times, we for the first time find a law in operation against prodigality as such, and not because other persons had interest in the property.

Previously interdiction applied only to property in which the agnate had an interest, and the prodigal, as we pointed out, was not deprived of any of his civil rights. Now it applied to all his property in whatever way he obtained it. Before classical times it only applied to a man who had an agnate, now it applied indiscriminately to members of a gens, to freedmen, &c. Before an agnate only could lodge a complaint, now any one could.

The old aristocratic notions of preserving the estate simply for the benefit of the kinsman disappeared, and the interests of the agnates and gentiles were no longer matters of much moment. The old laws had probably been found to work unsatisfactorily, estates bequeathed by will had been scattered, and the law of interdiction had probably not been a sufficient check on the reckless ways of the prodigal. The Romans, it may be noted, had a rooted objection to dying intestate. How all this came about is immaterial for our purpose. The fact remains that a complete revolution came about in classical times; the agnates were forgotten by the legislator in his zeal to protect the prodigal from himself. The praetor or judge who dealt with these cases no longer inquired from whom or how the prodigal received his estates, neither did the fact of his being a freedman enter at all into their considerations; one and all were amenable to the law if they followed the example of the Biblical prodigal. Contemporary classical writers are full of invectives against those who ran riot, and emphasized the dangers these persons were to the State.

There were now two kinds of guardians or curators: one appointed in accordance with the law of the XII Tables, and another nominated by the praetor or prefect of the city (Just., Institutes, lib. 1, xxiii. § 3) after inquiry. The prodigal could not be interdicted except by the magistrate, who made a decree after a demand for the nomination of a curator had been presented by his relations. It was the *duty*, it is interesting to mention, of the mother to take action, and if she failed in complying with the law she lost her hereditary rights. The other relations had the right of bringing the matter before the tribunal; but if either of these parties failed to take the initiative, the praetor could step in and pronounce the decree of interdiction. As soon as interdiction had been decreed a further inquiry was held to consider the person who was best suited to act as curator. The magistrate who held this supplemental inquiry did not necessarily nominate and appoint the curator—more often in practice one magistrate nominated and another appointed—but it would be superfluous for us to go into the details of the '*jus nominandi curatoris*' and '*datio curatoris*,' which powers were in course of time given to one person.

The magistrate was not, however, free to choose any one for the position of guardian. If the property which was being wasted were hereditary, the nearest agnate or agnates had to be selected in a prescribed order; but side by side with these, who were only nominally invested with the curatorship, the praetor could appoint any one he chose, who then managed the estate and was responsible for the prodigal's affairs (Digest, xxvii. 10 § 13).

Ultimately the praetor appointed whom he would to be guardian both in name and in deed. It sometimes happened that a father appointed a guardian for his prodigal son by will, in which case the praetor was bound to confirm the nomination, and even if the son were not interdicted the magistrate was compelled to put him under interdiction. The curator was bound to serve (Digest, xxvi. 5 § 6) unless he could plead one of the many excuses which were held valid. Women and minors, and men who did not enjoy the *jus civitatis* were prohibited from being guardians; and a husband was not allowed to be his wife's curator (Digest, xxvii. 10 § 14).

As the object now was to protect the interests of the prodigal who by interdiction was placed in a position of absolute incapacity, the law compelled the guardian to give securities for good conduct, and pledges that he would administer the property to the best advantage (Just., Institutes, lib. 1, xxiv.). If he was unable to produce sufficient surety the magistrate could, if inclined, relieve him of his functions, and he could also be relieved of his duties if he were suspected or guilty of any misconduct. An inventory

had to be taken of all the goods belonging to the prodigal, and the guardian was bound to present an account. His first duty was to sell everything which was likely to or could possibly deteriorate, such as houses, unproductive things, ornaments, &c.; and so obligatory was this clause that the wishes of the father as expressed in his will were frequently disregarded, in spite of the great reverence the Romans had for that instrument.

Under certain circumstances the guardian might also sell real estate, but the sanction of the magistrate was necessary for this. The guardian was forbidden to do anything that might in any way be detrimental to the interests of the prodigal, and he was also bound to take measures to recover any debts due. The obligations imposed on the guardian to invest and use the prodigal's money for the latter's good were very stringent; and if the rules laid down by the law were disobeyed, the former was responsible for the loss incurred (Digest, xxvi. 7). No gift could be made by him on behalf of his ward, nor could he give a marriage portion to any of the ward's children, and he was further not allowed to enfranchise any one, except with the sanction of the praetor. The amount of money to be spent on the maintenance of the prodigal was settled by the court, after examination of the parents and relatives.

The duties and responsibilities of the guardian were severe; in fact he replaced the prodigal entirely, and was practically *in loco domini* (Digest, xxvi. 7 § 27). The latter had of course the right to better his condition, if that were possible, without the assistance of the guardian, but the 'consensus' of this official was indispensable in cases where there was a possibility of the reverse, and in many cases, as we have said, the guardian was obliged first to obtain the sanction of the court. Anything which tended in this direction, such as the enfranchisement of a slave, which, as we mentioned above, was thought deleterious to the estate, was barred. Interdiction took away the prodigal's capacity for making or even witnessing a will.

In the later days of the Empire considerable modifications were introduced; the turning-point came when the Emperor Leo VI, surnamed Philosophus, who became emperor in 886, issued the 'Novellae Constitutiones,' in which a most important clause was that which concerned the incapacity of the prodigals. All the old laws referring to this were abrogated, and fixed rules were not made. The right of helping his poor relatives, of bestowing his goods on the poor, was given to him, besides many other concessions. After the Novel of the Emperor Leo the law of interdiction of prodigals practically ceased to exist, although not formally abolished.

FRENCH LAW.—The ancient law in France went through three stages. At the beginning it was essentially Roman, but when the Franks overran and ruled the country, the German customary law obtained, especially in the north, the south being always more or less under Roman influence. The third stage was reached later on, when the old Germanic customs, after borrowing freely from the Roman law, in reality became Roman. Interdiction in its absolute form continued up to the French Revolution, when it was finally done away with. The French law of the present day only recognizes a partial incapacity, and in the place of interdiction we find a *conseil judiciaire* or Committee. Interdiction is now entirely reserved for lunatics and madmen. The difference between the 'Interdiction' and the 'Committee' is clearly stated by M. Emmercy in his '*Exposé des Motifs*' for the law forming Chapter XI of the Civil Law in the sitting of the 3 Germinal, an XI de la République (see *Procès-verbaux du Conseil d'État*, tome 2, pp. 656, &c., 2nd ed. 1808), where he says: 'Il est possible qu'une personne dont l'interdiction aura été demandée pour cause d'imbécillité ou de démence ne paraisse pas être en cet état, mais qu'il soit bien prouvé, qu'à raison de la faiblesse d'esprit, ou de l'ascendant de quelque passion dominante, elle soit peu capable de la direction de ses affaires. Alors le juge serait embarrassé, si la loi ne lui permettait pas d'employer un autre remède que celui de l'interdiction. Le juge, en semblables circonstances, pourra intimer la défense de plaider, transiger, emprunter, recevoir des remboursements, aliéner ni hypothéquer, sans l'assistance d'un conseil qui sera nommé par le jugement. Vous apercevez, citoyens législateurs, la différence notable qui existe entre l'interdiction absolue et le simple assujettissement à prendre, dans certains cas spécifiés, l'avis d'un conseil.'

'Ceux auxquels on donne un conseil ne sont pas incapables des actes de la vie civile. Ils ne peuvent s'obliger, en contractant dans les cas prévus, sans l'assistance de leur conseil; mais, en général, ils sont habiles à contracter, ils peuvent se marier, ils peuvent faire un testament; ce que ne peuvent pas les interdits par cause d'imbécillité, de démence ou de fureur.'

A prodigal has complete civil and political liberty, and is only restrained as far as his property is concerned. The prodigal is in possession of his reason, and does not, as the lunatic, suffer from any natural incapacity.

In the same speech M. Emmercy also gives the reasons which induced him and his co-legislators to include these articles in the code. The object of a wise legislation, he says, ought to be to establish what is most suited to society, for whom the laws are made. The State, interested as it is in the preservation of the

family, cannot admit that the rights of property consist in the right of a citizen to ruin his family in satisfying his miserable whims and fancies or shameful caprices. The law ought to guard the interests of his wife and children, to whom at any rate he owes food and clothing; it ought also to watch over his other relations, who, through honour, generosity, or importunity, may some day be compelled to make good the misconduct of the prodigal at the expense of their own comfort. Prodigality does not result from one abuse, nor even from several; but if the abuse becomes a habit, there is no longer any doubt that the spendthrift is a kind of lunatic who is incapable of reasonable conduct, and to whom it is dangerous to allow free exercise of a right which he does not use, but which he continually abuses.

In the old French law the powers of the committee depended on the discretion of the judge on appointing him in each case. He might, in the judgment declaring the person a prodigal, appoint a committee with powers more or less extensive as he thought fit. Under the Code Napoléon, Art. 513, one cannot demand the assent of a committee except for the things which are prescribed by that article; the result of this is that on matters outside the article the prodigal is absolutely free. The state of a prodigal is regarded as a matter of status. All matters of status are matters of public order. There are three important consequences which result from this: first, that the tribunals can only appoint a committee for prodigals and lunatics; second, that for the appointment of a committee no agreement or admission or ignoring of legal proceedings, or acquiescence in legal proceedings affects them one way or the other; third, the demand for a committee must be communicated to the public authority, and judgment cannot be given without reference to him.

The right to demand the nomination of a committee lies with every relation of a prodigal, and both husband and wife had the same powers with regard to each other (Code Nap., Art. 490, 514), and besides these, the right was also vested in the public authority (Code Nap., Art. 491, 514), if the prodigal had no relations, and in the case of a foreigner resident in France, because public order was concerned where a man was recklessly squandering his money, and it was the duty of the law to repress such acts. The prodigal himself could not ask for a committee.

The court before whom the proceedings come is the one in whose jurisdiction the prodigal is resident. The persons who wish for the appointment of a committee must address a demand for it to the presiding judge of the tribunal competent to give it. This demand must be in writing, and ought to contain the facts relied on to

prove the prodigality, the names of the witnesses and examples of prodigality, but when the case actually comes to trial they are not confined to the witnesses or facts mentioned in this demand (Code Nap. 493, and Code Civil 890). When the president of the tribunal has received the demand he must, under the terms of Article 891 of the Code of Procedure, order the communication of this demand to the public authority and commit it to a judge to make a report on it on a day to be fixed. When the request for a nomination of a committee has been communicated to the public authority in conformity with the rules of procedure, and the judge has made his report, it is then the duty of the tribunal to make its decree, and in order that this decree shall be made with most light and certainty the law prescribes that the opinion of the family council shall be obtained. Of course, it is evident that if, on the examination of the facts related in the request, it should be shown that the person accused of being a prodigal is not one, the tribunal is not obliged to call together a family council. But if the procedure must go on, the opinion of the family council is indispensable. The person who has instituted the proceedings, however, cannot take part in this family council; with this exception, that the husband, wife or child can always sit on the family council. If, however, the demand for a committee emanated from any one of these, then they may only take a deliberative part in its proceedings, and they have no vote (Code Nap., Art. 495). The family council deliberates in the ordinary form, and can, if the judge thinks fit, hear the alleged prodigal or his legal representative. Article 883 of Civil Procedure prescribes that in every case in which the deliberations of the family council are not unanimous the opinion of each of its members shall be mentioned in the report. The Civil Code then goes on to say that the alleged prodigal is to be interrogated by the judge after he has read the report of the family council. The interrogation of the prodigal always takes place privately, on account of the delicate nature of the investigation. The prodigal does not lose his capacity until the court has definitely decreed a committee to him. If the interrogation and reports are not sufficient, and the facts can be proved by witnesses, the tribunal can order a trial if it wishes. Under ordinary circumstances the prodigal ought to assist at this trial, but the tribunal can make a decree even if he is absent. After all the measures taken to obtain information are terminated, the court directs the reports of the interrogatories and of the inquiry to be handed to the alleged prodigal, and then he is given time to plead.

The judgment on the demand for a committee must be made publicly, and must be published in a special form. The prodigal

may appeal, or any of the parties concerned—i.e. the right of appeal belongs to the person who has instituted the proceedings, the person against whom they are instituted, and every member of the family council. Third parties have no right of appeal, because the question is not a pecuniary one, but a question in which the State is interested. The fact of lodging an appeal has the effect of suspending the appointment of a committee. The result of the trial must be made public. As in practice the list of lunatics and prodigals is a long one, the public is notified that a register exists which is always open, in which the names of those who are either lunatics or prodigals are inscribed. If the proceedings for making public are not fulfilled, the judgment of the court is equally valid; the only effect is that the person who has put the law into motion and his legal adviser are responsible for any damage which may happen to a third party if he contract or has dealings with a prodigal whose prodigality is not made public.

The tribunal appoints the committee, and has complete freedom of action in doing so. The most usual course is to choose some solicitor or barrister; the main point being to nominate such persons as are likely to be of assistance to the prodigal. Relatives are rarely asked to serve because they are considered interested parties. A husband, however, is usually in practice the 'Conseil judiciaire' to his wife; the wife is never the 'Conseil judiciaire' of her husband, as the husband, in spite of the decree, preserves his marital rights under the common law.

The function of the committee is an important question. Article 513 of the Code Napoléon reads: 'Il peut être défendu aux prodigues de plaider, &c., *sans l'assistance* d'un Conseil.' A great deal of discussion has arisen as to what the term 'assistance' implies; for instance, whether the committee has the power to act alone, but from the text of the law it seems clear (and this is also the general opinion) that the committee can never act without the prodigal. There are, however, undoubtedly cases where the prodigal can act without the 'assistance' of the committee. This would happen when the prodigal seeks to obtain the nomination of a committee *ad hoc* or the cancelling of the committee nominated.

The effect of the nomination of a committee renders the prodigal incapable in respect to those things enumerated in Article 513 of the Code Napoléon, which is as follows: 'Il peut être défendu aux prodigues de plaider, de transiger, d'emprunter, de recevoir un capital mobilier et d'en donner décharge, d'aliéner ni de grever leurs biens d'hypothèques.' 'Prodigals may be forbidden to implead, to settle disputes, to borrow, to receive any movable capital,

and to give a discharge therefor, to alienate, or to encumber their property by mortgages.' In all other matters the prodigal has the rights of an ordinary citizen under the common law. He preserves the government of his person, and can live where he likes and follow any profession he likes. The strict rules of old Roman days are no longer in force. The prodigal may marry, make a will, or adopt an illegitimate child if he pleases, and not only this, but he has full power to exercise his political rights, except that he loses the doubtful privilege of serving on a jury (Laws, November 1872, Suppl. to Code). The management of his property is still left in his own hands under the care of the committee, and the spendthrift may make leases, but not for a longer period than nine years. In a word, he has control over his property as far as improving it is concerned, provided he does not commit any of the five acts forbidden by Article 513 of the Code Napoléon above cited.

As soon as judgment has been pronounced, the committee enters into exercise of his duties. Acts done by the prodigal prior to judgment being pronounced cannot be annulled, except those which have been entered into after the demand for a committee had been made, and all acts done after the judgment without the 'assistance' of the committee are null and void, 'de droit' (*ipso facto*), irrespective of the fact whether they are advantageous or not to the prodigal.

The spendthrift is forbidden:—

(1) 'Plaider,' to implead, but there are cases where the letter of the law is not insisted on; for instance, when he appeals against the judgment which has just made him incapable, or when he asks for liberation from incapacity, and also in those cases when he asks for a committee *ad hoc*.

(2) 'Transiger,' i. e. to settle any dispute or compromise a right of action, which is in effect alienating a part of his claims in order to avoid an action, is forbidden.

(3) 'Emprunter,' or to borrow.

(4) 'Recevoir un capital mobilier, en donner décharge,' to receive a movable capital and to give a discharge therefor—the intention of which was to prevent the prodigal from spending any sum of money which he might receive. This regulation placed him in the same position as the minor.

(5) 'Aliéner,' alienating or encumbering his property with a mortgage.

Such in brief are the laws in France at the present day.

We propose now briefly to point out the chief differences which exist in the laws in Germany.

Two different systems of law broadly obtain in Germany, namely

that in which the French Code Napoléon and its provisions, with certain unimportant differences, have been adopted, and the other where the German customary law is in force. What we have said about the French code of course holds good in the former. There are minor modifications of the French code in the different states; one of the most interesting of these is that in Baden, which combines the severer German common law with the French civil procedure. If the prodigal in Baden disregards the advice of his tutor, and does things which he is forbidden to do when in a state of pupillage, he can be put in a state of absolute pupillage. The care of the prodigal is a matter under the care of the public authority.

Where the German customary law obtains, special administrative boards, organized according to the special laws of the various states, have charge over persons who have not full rights, such as prodigals, minors and orphans. These administrative authorities nominate a tutor if necessary, and it is their business to look after the management of the estate by the tutor; for instance, they oblige him to put into their hands all the title-deeds and objects of value of the prodigal on taking up the curatorship; and the tutor has also to render yearly accounts to them. The tutor represents the prodigal in the most absolute fashion, and the latter is not permitted to intervene in the acts done in his name, except of course acts which cannot be done except by him, as the making of a will, &c. The tutor administers under the control and with the consent of the administrative authority, much as a guardian in England acts under the control of the Court of Chancery when his ward is a ward in Chancery.

The essential characteristic of modern German law is the frequent intervention of this authority.

According to the German common law, which in this respect was similar to the Roman law, the putting of a person into a state of pupillage is done by this public authority, while the Prussian and French law make it the result of a private application by those interested in putting the prodigal in a state of pupillage.

The new German Code of Civil Procedure attempts to strike a middle line between these two systems by making the interference of the public authority depend on the complaint of the individual. The persons who may make this complaint are the persons set forth in the Code of Civil Procedure and any other persons who by the law of the particular state in which the prodigal is living may have a right to make the complaint. Roughly speaking, these are the near relatives, the husband or wife of the prodigal, and in some places also the public authority, who would have to provide for the maintenance of the prodigal if he become destitute,

such persons as would correspond with our Poor Law guardians. Where the German common law obtains the prodigal loses his status entirely as a free man, and is under all the disabilities of the Roman interdiction. The complaint must contain the facts and the means of verifying them on which the complainant relies in establishing the fact that the person is in reality a prodigal. What constitutes a prodigal depends on the law of the particular state. In Prussia the plaintiff must allege facts from which it appears that the alleged spendthrift is considerably diminishing his estate through frivolous and useless expenditure or by idle neglect. In Saxony facts must be proved that leave no doubt that the prodigal 'sein Vermögen auf leichtsinnige Weise durchbringt und hierdurch sich und seine Familie der Gefahr eines Nothstandes aussetzt.'

Where there is no legal definition of a prodigal facts must always be brought before the court which show with a reasonable amount of certainty that the accused person will bring his family into want or himself become a burden to the relatives, if he is allowed to continue his frivolous course of life.

It is the duty of the administrative authority itself, before starting the procedure for putting the prodigal under pupillage, to satisfy itself that the complaint is brought by the proper persons, and to examine into the reliability of the facts alleged. Of course if the complaint issues from the wrong persons it falls to the ground, but the complainant has a right of appeal.

The putting of a person under a pupillage is a matter which does not depend on the parties themselves, and is not conducted on the principle of an ordinary action. In an action between parties the final result may depend on the conduct of it by the parties, viz. consent of the defendant to judgment or his evidence and admissions, or the fact that he has failed either to put in a defence or to enter an appearance. The public authorities in case of an application for pupillage satisfy themselves affirmatively as to the facts by any means they may think necessary before making a decree of pupillage.

The judge who makes the inquiry is generally a magistrate, and if he should come to the conclusion that the person accused is a prodigal, he has to announce it to the administrative authorities, to the prodigal himself and to the complainant. The spendthrift is under a state of pupillage from the time the decree is announced to him (A. 623, 'Civilprozessordnung'). It is the duty of the court to make the fact of his being declared a prodigal public (A. 627, 'Civilprozessordnung'). How it should actually be made public depends on the law of each State.

The alleged prodigal may appeal against the decision, and he can, if he has been put under pupillage, have the decree of pupillage removed on showing good grounds. While the appeal is pending, or until he has succeeded in getting the decree revoked, he is in the position of a person in a state of pupillage. If he should gain his action, and have the decree annulled, his acts during the state of pupillage will be regarded as legally binding on him, and at the same time the acts of the guardian will also be binding (A. 613, 'Civilprozessordnung').

The nomination of the tutor is, as we have seen, in the hands of the administrative authorities, who consider in an order prescribed by the law the persons related to the prodigal, so far as they are suitable to be tutors; but they are not confined to them, but have an absolute choice.

The tutor undertakes his duties after taking an oath or an affirmation to the administrative authorities, and he receives a 'Gegenvormund,' a co-trustee, to control him where the means of the prodigal are large, and in cases where his interests seem at variance with those of the prodigal. There are very exact arrangements as to the conduct of the tutor prescribed by the codified law by sections 1793-1836 of the Civil Code¹.

In Prussia, as soon as the decree of pupillage has been pronounced, the tutelary authority takes the advice of the 'Waisenrath,' which is composed of one or more members of the 'Gemeindemitglieder,' and they must then call in the following persons to assist the tutor—namely, the father, mother, and maternal and paternal grandfathers of the prodigal. The father and husband are legal guardians, and the wife also can claim to be a tutor.

There are a couple of points of difference in the Italian and Austrian law which may be noticed here.

The Italian law is of course Roman law. The present Civil Code was first promulgated in 1886, when all the local laws of the different provinces disappeared. As regards the prodigal, the law is the same as that of the Code Napoléon, with this addition, which runs: 'Nè fare altro atto che ecceda la semplice amministrazione, senza l'assistenza di un curatore da nominarsi dal consiglio di famiglia o di tutela.' The tutor is in Italy therefore appointed by the 'conseil de famille' or the 'Vormundschaftsbehörde,' not by the tribunal, as in France.

The other point to be noted is the means the Italians employ in making the decree public. In every praetorship the registers are kept, one for minors and interdicted persons, and the other

¹ In force on and after Jan. 1, 1900, see the Einführungsgesetz, art. 1.

for those who are otherwise incapable (Codice Civile 343). A greater publicity seems to be attained in this way.

The Austrian law is practically the same as the German law. The 'Vormundschaftsbehörde' select the guardian, and follow a strict order prescribed by the law in doing so; but they must first make a minute examination into the facts alleged against the prodigal, and satisfy themselves that prodigality exists. It is obligatory on the person chosen to serve, and he is, as in Germany, always subject to this board, to whom he has to render yearly accounts, and from whom he has to receive permission if he wishes to invest or otherwise spend the capital of the prodigal. The guardian in Austria is paid for his services.

We have now traced the history of pupillage from its inception in Roman law, and we have shown how it has been considered necessary in most of the States of modern Europe. It remains, therefore, for us to deal with the question whether any trace of it exists in English law, and what change, if any, should be made therein. The question whether any change should be made or no is, as we have seen in the beginning, rather a question for the statesman and the social inquirer than for the lawyer. How it should be effected if they should determine that a change ought to be made is the province of the comparative jurisconsult, after explaining the provisions which exist in other countries.

In Roman law the enactments against prodigals arose, as we have seen, not for the purpose of discouraging useless and foolish expenditure, nor out of a sense of preserving public order, but to protect the rights of the individuals belonging to a family in the common property of the family, and it is here that we should expect, if anywhere, to find traces of the law of prodigality in England. Accordingly, we find that when the law gave persons not connected with the family an interest in the family property, it sought to protect the estate from their devastations. Before the time of Henry III and Edward I, the husband who had an interest in his wife's property by the courtesy, and the wife who had rights of dower in her deceased husband's estate were prevented from wasting it. By the statutes of Marlbridge, 52 Henry III, and the statute of Gloucester, 6 Edward I, c. 5, the idea of protecting the family property was extended to other persons who happened to have a temporary interest in the estate; and since then the tenant for life was prohibited from wasting the property, and a writ of waste lay against him at the suit of the remainderman. This writ of waste was abolished by 3 & 4 William IV, c. 27, s. 36, but the principle exists up to the present day, and the remainderman has a right to bring an action for an injunction

or damages if the inheritance is damaged by what the law considers waste.

We are only dealing here with the principle, and therefore it is not necessary to go into the distinction of the law between voluntary, permissive, or equitable waste. These are distinctions which only define the different ways in which the property may be deteriorated, some of which the law would not deal with, and others it would. The object, however, of the law of waste was to prevent the temporary possessor of the family property actively damaging it. When we consider how little personal property there was in England, and how small the trade was until the Stuart period, it is not surprising that the principle of the law of waste was not extended to personal property. So small was the value of personalty even in the time of Queen Elizabeth, that the statute which is the foundation of our poor law, though it provided for the rating of both personal and real property for the relief of the poor, became inoperative so far as personalty was concerned, and it has never since been rated.

The only approach given by the law in England at present to a protection of the prodigal himself seems to be the equitable doctrine whereby expectant heirs are relieved from extortionate bargains. In this case, however, the bargain is made when he is not in possession of his property; and the theory of the law is that, owing to his present necessities, he is unable to protect himself. Mere inadequacy of the price given will entitle the prodigal to seek relief from the contract, and the onus of proof is on the purchaser to show the price was a fair one (*Earl of Aylesford v. Morris*, L. R. 8 Ch. 490, and *O'Rorke v. Bolingbroke*, 2 App. Cas. 814). This principle was extended in *Nevill v. Snelling* to a person who was not an expectant heir, but has only a general hope of being remembered by his father in his will (15 Ch. D. 679).

The Lunacy Act of 1890 enables the judge in lunacy (s. 116 d) to apply the power of managing property contained in the Act to a person not found a lunatic. The judge must be satisfied that such person is 'through mental infirmity arising from disease or age' incapable of managing his affairs; but it has never yet been suggested to the court that prodigality came under this head.

Scottish law, which has borrowed considerably from Roman law, has naturally traces of the law against prodigals, and interdiction exists in the sense of a legal restraint laid upon such persons from signing any deed to their own prejudice, without the consent of their curators or interdictors.

As interdiction involved a previous inquiry into the person's condition, a custom arose in Scotland, which was sanctioned by

the law, of avoiding this inquiry by submitting to a 'voluntary interdiction.' This generally takes the form of a bond by which the prodigal binds himself to execute no deed which may affect his estate without the consent of the persons named in the bond as curators. This interdiction is irrevocable by the prodigal himself, but can be got rid of by the consent of the Court of Session or the assent of all the parties to the bond, and also, where the bond provides for a certain minimum number of interdictors, and the quorum is reduced by death. There is also a judicial interdiction imposed by the Court of Session. This sentence is the result of an action brought by a near relative, or by the action of the Court itself, where it appears in the course of a suit that it is advisable. In olden days the interdiction was published at the Market Cross, but now there is a general register kept which is equivalent to publication.

Interdiction in Scotland, since the decision of Bruce and Forbes in 1634, only affects real estate. The interdictors do not manage it, but only give or refuse their assent to contracts. The form of 'voluntary interdiction' appears to be much the commoner, as there is no publicity attached to it except the fact that the name appears in the register. In cases where a voluntary interdiction cannot be obtained, the Scottish law relating to 'unconscionable bargains,' and to 'facility,' and 'circumvention,' is often a sufficient protection.

SUGGESTIONS.—As we have pointed out, it is not the function of a legal article to discuss the economic disadvantages of prodigality at any length. We have done enough in the introduction to indicate what these are; the only question, therefore, which remains is what practical remedy can be applied which would restrain prodigality and at the same time not interfere too much with the liberty of the subject. It is quite clear that nothing can be done to restrain prodigality as long as the prodigal is treated as a person having full powers of contracting, and able to bind himself and his property. For this reason the Roman law, the French law, and the German law have all dealt blows at the prodigal's power of contract: the Roman law, and the German law which is not of French origin, by absolutely taking away the right of contracting from him; the French law by making his contracts binding only when he received the assent of the 'Conseil judiciaire.' Hitherto the liberty of contract has only been interfered with in Ireland with reference to land legislation, and in England in the limited number of Acts which forbid 'contracting out,' such as the Truck Acts, Agricultural Holdings Act, and Workmen's Compensation Act. In this latter Act it is provided that, unless the registrar of friendly societies is satisfied that the employer is

prepared and able to give his workmen advantages not less than they would receive under the Act, they shall not be allowed to make any contract relieving the employer from the obligation of the Act. In all these cases, however, English legislators have shown that they are prepared to deal with liberty of contract if they consider the circumstances of the case require it.

By the Inebriates Bill of 1895, Lord Herschell and the late Liberal Government (see Parliamentary Debates, 4th ser., vol. xxxiv, pp. 1627-1647, June 21, 1895) showed that they were prepared to go further, and were willing to encroach on the personal liberty of the subject, if it was desirable for the good of the individual or that of the public, and this not only when he had committed a criminal offence, but when he had never been before any court of any kind. It was proposed by that Bill to imprison habitual drunkards in asylums for a minimum period of twelve months, and a maximum period of two years, if it could be proved to the satisfaction of a County Court judge or a High Court judge that they were such. Lord Herschell relied on the fact that habitual drunkards were a cause of mischief not only to themselves, but also to their families; though in causing their misery they had been guilty of nothing that in the eye of the criminal law amounted to cruelty. It is not difficult to understand that the danger of abuse by interested parties of this power of imprisonment prevented it becoming law; and that therefore the provisions of that Bill were not reintroduced in the Habitual Inebriates Act of 1898; but it was a far stronger measure to attempt to deal with personal liberty than to deal with the liberty of contract.

We have in England no public official authority corresponding to the German 'Vormundschaftsbehörde,' which has the care of minors, lunatics, and prodigals. The Chancellor has, indeed, nominally the care in England of wards in Chancery and lunatics, which jurisdiction is in fact exercised by the Chancery Court and a judge or master in lunacy, but there is nothing corresponding to a board exercising general supervision over persons requiring guardianship. It seems to us that an inquisition might be held similar to that of the Lunacy Act 1890, 53 & 54 Vict. c. 5, s. 90, whereby the judge in lunacy may direct an inquisition as to whether a person alleged to be a lunatic is capable of managing himself and his affairs, and an issue directed which may be tried before a jury as to whether he is so or not. In the case of a lunatic it is usual to appoint a committee both of the lunatic's person and of the lunatic's estate¹. In the case of a prodigal it would of course

¹ [There is no difficulty about appointing a committee of the estate alone in proper cases.—Ed.]

not be necessary to appoint one to his person, but a committee might be nominated to take charge of the prodigal's property; and this committee might have the same powers of acting in the management of the estates as in the case of a lunatic the committee has under the supervision of the judge in lunacy. It would be easy to provide for the advice and assistance of the family in some method as the French and Prussians do by the 'conseil de famille.' Lord Halsbury in the debate on the Inebriates Bill of 1895 (see Parliamentary Debates cited above) said he would be glad to see in reference to inebriates some such institution as the 'conseil de famille,' and it seems desirable to have the family represented if only for the sake of giving them an opportunity of expressing their opinion. The committee should have a power of giving the prodigal such an allowance as his estate and position justified.

It is a matter of detail who should be allowed to institute the proceedings, whether only members of the family or also any public authority who might have to provide for the prodigal's support, and whether the alleged prodigal should be put under these powers for a definite time, or only have to satisfy the court that he was not likely to continue his prodigality. The test of prodigality ought to be the uselessness or folly of the expenditure, taking into account the alleged prodigal's position in life, and whether it is habitual or only occasional.

It might be argued that a great injustice would be done to persons dealing with the prodigal without knowledge of the fact that he had been declared a prodigal. The announcement of the decree might be given the same publicity as a bankruptcy, and provision made similar to those in the Bankruptcy Acts, making it a criminal act to incur a liability over a certain amount without declaring that he has been made a prodigal. There can, however, be no absolute protection to persons who are willing to run risks with those absolutely unknown to them.

C. T. HAGBERG WRIGHT.

ENGLISH JUDGES AND HINDU LAW.

THIRD PAPER.

IN the month of February of last year the Judicial Committee of the Privy Council decided that a Hindu, governed by the Mitakshara school of Hindu law, who had a son living at the time, and who was in possession of an impartible ancestral Raj or Zemindari, could, according to the law of the Mitakshara school, give by will the ancestral family estate away from the family to a stranger. The Committee on the occasion was composed of the Lord Chancellor, Lord Hobhouse, Lord Macnaghten, Lord Morris, and Sir Richard Couch. The judgment was delivered by Sir Richard Couch. Beyond saying that the question was concluded by an earlier judgment of the same tribunal which was delivered in January 1888, the Committee gave no reasons for the conclusion at which they had arrived, and as the judgment will be a good deal criticized in India, and certainly does not represent what Hindus understand their law to be, it will be interesting to examine the subject rather more closely than the Committee have thought it worth while to do.

In a paper which appeared in the April number of this REVIEW of last year, I endeavoured to describe the incidents of a joint Hindu family, governed by the Mitakshara school of law, where the ancestral estate is partible in the ordinary way, and in order to make what follows clear I will repeat a very short portion of what I then said :—

‘It appears then that the rights of the members of an undivided Mitakshara Hindu family in the ancestral property of the family are clear and easily understood. So long as the family remains joint and undivided, each member has the same rights in the property, i. e. the right to be supported as a member of the family, in the family, by the income of the entire property, in the case of males and their wives for life, and in the case of daughters until marriage; with the added right that all male members, or at least all male members who are within four degrees of descent from the existing head of the family, may compel a partition of the family property, and, upon such partition, would obtain the absolute ownership of a share of the corpus instead of a life interest in the entire income.’

I do not think any one will dispute the accuracy of this descrip-

tion as far as it goes, though of course, according to the later decisions of the Privy Council, the rights of descendants are much lessened by the religious duty, which the Hindu religion is said to impose upon descendants, to pay the debts of their ancestor. And, as far as I know, no court or writer upon Hindu law, down to the year 1888, ever doubted that the rights of the entire family in an impartible ancestral estate were the same as the rights of the entire family in an ancestral partible estate, except that no member of the family could ever compel a partition, but the entire estate must always remain in the possession of the person who was the head of the family for the time being. Down to that time every one supposed that such families and their ancestral properties were governed by the text of Manu—‘Or the eldest brother alone may take the paternal wealth in its entirety and the others may live under him as they lived under their father.’ The result of this view of the rights of the family in the ancestral property was understood to be, that no portion of an ancestral impartible family estate could ever be alienated, unless all the members of the family were parties to the transaction, for the reason that as no member could compel a partition, no member could ever become the sole and absolute owner of any portion of the corpus.

In order to show that this was the opinion of the Judicial Committee itself down to the year 1888, it is only necessary to refer to three cases. In the first of which (*Muttaswami v. Vencataswara*, 12 M. I. A. 225) the judgment was delivered by Sir James Colville on December 2, 1868. In the second (*Sree Raja Yanumulla v. Sree Raja Yanumulla Bhoochia*, 13 M. I. A. 333) by Sir James Colville on February 2, 1870, and in the third (*Muttayan Chetti's case*, 1 I. L. R. Madras 1) by Sir Barnes Peacock on May 10, 1882. In the first of these, maintenance was awarded to the illegitimate son of the last holder of an ancestral impartible Zemindari, against the person then in possession, on the ground that the plaintiff was a member of the family, and as such entitled to be maintained out of the family property. In the second, the judgment contains the following passage:—

‘It is therefore clear that the mere impartibility of the estate is not sufficient to make the succession to it follow the course of succession to separate estate. And their lordships apprehend that if they were to hold that it did so, they would affect the titles to many estates held and enjoyed as impartible in different parts of India.’

This can only mean that the estate though impartible is the property of the family, and that upon the death of the holder it passes by survivorship to some other member of the family. For

the reason that no other mode of succession except this and the mode in which the succession to separate estate is regulated is known to the Hindu law. In the third, the question was whether a charge, created by the head of a Mitakshara family upon the ancestral impartible estate, was binding upon the estate after his death in the hands of his son who had succeeded him as the head of the family. The Judicial Committee held that it was, because it was the pious duty of the son to pay his father's debts. If, as is now said, the impartible estate, because it is impartible, must be the absolute property of the person who happens to be in possession of it, any argument founded on the pious duty of the son must be entirely beside the question. The view which Hindus themselves took at that time of the institution is very clearly expressed by Pandit Jogendra Smarta Siromani in his commentary on the Hindu Law edition of 1885, at page 239. He there says:—

‘The eldest son, who succeeds by primogeniture to an impartible Raj, is absolute owner of the whole income of the Zemindari and its savings and investments acquired with such savings. Consequently none of his coparceners, lineal or collateral, can have any right to control him in the disposal of the income. Alienations and encumbrances, made by the Raja for the time being, are therefore good for his life. Even the eldest son, who would succeed him ultimately, cannot in the lifetime of the father sue to set aside such alienations. By birth he becomes a joint owner; but the estate being impartible he cannot demand partition from his father.’

This was the position in January 1888 when a board of the Judicial Committee, which consisted of Lord Fitzgerald, Lord Hobhouse, Sir Barnes Peacock, and Sir Richard Couch, determined the case of *Sartaj Kuari v. Deoraj Kuari*, 15 I. A. 51 and 10 Allahabad 272, by a judgment which was delivered by Sir Richard Couch. The facts of the case were as follows. Raja Bhawani Ghulam Pal, a Hindu governed by the Mitakshara school of Hindu law, was in possession of an ancestral impartible Raj or Zemindari, which was no doubt valuable but the actual value of which was not proved. He had two wives, the elder of whom had a son, while the younger appears to have been childless. In this state of the family, the Raja executed a deed, by which he granted a number of villages which formed part of the Raj estate to his younger wife. The value of these villages was not proved, but it was suggested that they formed the most valuable portion of the ancestral impartible property of the family. This transaction in form appears to be an absolute alienation of a portion of the ancestral property of the family from the family by its head the Raja. In substance it is nothing of the kind. It is, in fact, a very common mode of setting

apart a fund for the purpose of providing for the maintenance of a dependent member of the family. And, as in this case, the gift was one of immovable property by a husband to his wife, it would, unless the grant was in a very special form, which is extremely unlikely, only enure for the lifetime of the grantee, and upon her death the villages would revert to the Raj estate. It is very certain that the parties to the transaction never regarded it as a permanent separation of these villages from the rest of the Raj estate. Sir James Colville in a case reported in the 13th Moore's Indian Appeals says, at page 340 :—

‘These grants by way of maintenance are, in the ordinary course of what is done by a person in the enjoyment of a Raj or impartible estate, in favour of the junior members of the family, who but for the impartibility of the estate would have been coparceners with him.’

If, instead of using the word coparceners, by which he appears to have meant persons who could have compelled a partition, Sir James Colville had said ‘persons entitled to be maintained out of the family property,’ his description of this class of transaction would still have been quite accurate.

Some years after the execution of the grant, the suit in which the appeal arose was brought, in the name of the son of the Raja by his elder wife through his mother as his guardian, against the Raja himself and his younger wife, the grantor and grantee of the villages, to obtain a declaration that the grant was void on the ground that the Raja had no power to make it. The subordinate judge decreed the suit on this ground, and a division bench of the High Court at Allahabad affirmed his decision. The case was then brought before the Judicial Committee of the Privy Council on the appeal of the defendants, and that tribunal on January 21, 1888 allowed the appeal and dismissed the suit on the ground that an impartible estate must, because it is impartible, be the absolute property of the person in whose possession it is, who may divide it or dispose of it, or any portion of it, in any way he pleases. And that impartible only means that no member of the family except the head has any right of property in the ancestral estate or can compel its partition. At page 286 of the report Sir Richard Couch, in delivering the judgment of the Committee, says :—

‘The reason for the restraint upon alienation under the law of the Mitakshara is inconsistent with the custom of impartibility and succession according to primogeniture. The inability of the father to make an alienation arises from the proprietary right of the sons.’

And at page 287 :—

‘The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their lordships’ opinion, so connected with the right to a partition, that it does not exist where there is no right to it.’

But at page 288, in the same judgment, he says:—

‘If, as their lordships are of opinion, the eldest son where the Mitakshara law prevails, and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved.’

It is difficult to reconcile this passage with the other passages quoted from the same judgment, or to understand how impartibility can be consistent with an inalienability which depends upon a special custom, while it is inconsistent with an inalienability which depends upon the general law or custom of all Hindus who are subject to the law of the Mitakshara. Sir Richard Couch does not notice the fact that the grant was to a female member of the family, and would not in any case enure for more than her lifetime, but treats it as an absolute alienation by the head of the family, from the family, of a portion of the ancestral family estate. If the view which I have expressed of the real nature of the transaction is correct, no such questions as those upon which the Committee gave their opinions arose in the case at all, as the only questions upon which the decision of the case depended were whether this particular maintenance grant was valid for the life of the lady to whom it was made, and if not was it valid for the life of the Raja by whom it was made? I am not aware of any decisions upon these questions, but I have little doubt that the grant would be good for the life of the grantor, at all events, unless it was of an unreasonable quantity of the ancestral estate, having regard to the value of the entire estate. And I have no doubt that this was the reason for the suggestion, mentioned at page 274 of the report, that the villages included in the grant formed the most valuable portion of the Raj estate. The decision of these questions in their favour would have been enough to decide the action in favour of the defendants. The Committee, however, did not deal with the grant as being a maintenance grant, but treated it as an absolute alienation and based their decision upon the then entirely novel doctrine, *that if an estate is impartible it must of necessity be alienable*. Sir Richard Couch cites Sir James Colville’s remark, which I have already quoted from the 13th Moore’s Indian Appeals, as a clear opinion that though an impartible estate may be for some purposes spoken of as a joint family property, the coparcenery in it, which under

the Mitakshara law is created by birth, does not exist. He does not notice the fact that in that case Sir James Colville held that a dependent member of such a family was entitled to be maintained out of the impartible family property, and that his right could be enforced by a court of law ; but, *without mentioning such rights at all*, proceeds to totally destroy them by affirming that the head of the family was the sole and absolute owner of the ancestral impartible estate and could dissipate it in any way he pleased.

The view which Hindus themselves took of the institution after this judgment of the Judicial Committee will be found expressed by Baboo Golapchandra Sarkar Sastri in his *Hindu Law*, published in 1897, at page 295 et seq. He says :—

‘ Although the impartible estate cannot be held by more than one person, and is possessed exclusively by one member at a time, yet they may be the joint property of the members of a joint family, governed by the Mitakshara, so as to pass by survivorship.

‘ It should be observed that where property is held in coparcenery by a joint family under the Mitakshara, there are ordinarily three rights vested in the coparceners, namely, the right of joint enjoyment, the right to call for partition, and the right to survivorship. Where impartible property is the subject of such ownership, the right of joint enjoyment of the members other than the holder thereof is reduced to the right of maintenance receivable from the estate by virtue of the co-ownership, and the right of partition is, from the nature of the property, incapable of existence. But the right of survivorship founded on co-ownership is not inconsistent with the nature of the property, and therefore remains unaffected.

‘ The holder of a joint but impartible estate is a co-owner though entitled to exclusive possession, and as such he appears to be under two duties to his coparceners in virtue of their co-ownership, namely the duty to provide them with maintenance, and the duty to preserve the corpus of the estate, which he alone, being one of several joint tenants, is incompetent to alienate except for justifiable causes (*Naraganti v. Venkata*, 4 M. S. 250).

‘ In this respect there appears to be a conflict between the different decisions of the Judicial Committee.

‘ In the Tipperah case of *Neel Kinto Deb v. Beer Chunder Thakur*, 12 M. I. A. 540, the Lords of the Judicial Committee observe as follows :—“ Still, when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction, involving also a contradiction to call this separate ownership, though coming by inheritance, at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of co-parcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title ; survivorship cannot obtain in such a possession from its very nature, and there can be no community of interest ; for claims to an estate in lands, to rights in others over it, as for maintenance,

for instance, are distinct and inconsistent claims. As there can be no such survivorship, title by survivorship, where it varies from the ordinary title by heirship, cannot, in the absence of custom, furnish the rule to ascertain the heir to a property which is solely owned and enjoyed, and which passes by inheritance to a sole heir."

'This was a Bengal case governed by the Dayabhaga, and so is no authority in a case governed by the Mitakshara, according to which a son, living jointly with his father, inherits even the latter's self-acquired property by survivorship and not by inheritance. It would, no doubt, be a contradiction in terms to call a separate ownership at once sole and joint ownership; but it would be begging the question to call the right of a single person to hold an impartible estate a separate ownership.

'Then, again, why should not the right of the other members to maintenance out of the estate be referred to their joint ownership in the impartible estate? the inequality and disproportion between what is received by the holder of the estate and what is paid to each of the other members for his maintenance cannot and does not affect their co-ownership, as similar inequality obtains in even other circumstances. For instance, take the case of a joint family consisting of eleven first cousins, of whom one is the son of one brother, and ten are the sons of another brother; here, on partition, the former would be entitled to half the estate, and each of the others to one-twentieth, yet there was co-ownership and survivorship among them. The excess of what the holder of the estate over what any other member receives is designed for the preservation of the dignity of the family and the improvement of the estate.

'The argument that a son does not acquire a right by birth to an impartible estate in the possession of the father, because the former cannot demand partition, is contrary to Hindu law, which recognizes ownership in property, the only ordinary legal consequence of which is the right to receive maintenance from that property. And this co-ownership, which may be called imperfect or subordinate, is recognized to account for the right of maintenance, which the wife and a son enjoy in the property of the husband and the father respectively. The ignoring of this doctrine of Hindu law has led to serious misconception, namely, the denial of proprietary right by reason of the want of power to demand partition.

'Accordingly in other cases the Privy Council have given effect to survivorship: *Naragunt v. Vengama*, 9 M. I. A. 68; *Chintamun Sing v. Mt. Nowlukh Konwari*, 2 I. A. 263; *Raja Rup Sing v. Rani Baisni*, 11 I. A. 149; *Maharani Hira Nath Koer v. Baboo Ram Narayan Sing*, 9 B. L. R. 274; *Raja Jogendra Bhupati v. Nityanund*, 17 I. A. 128.

'When a member of the family gets maintenance from the holder of an impartible estate, or enjoys the rents and profits of land granted in lieu of maintenance, he is deemed to be constructively joint in estate with the holder, so as to be entitled to get the estate by survivorship.

'But, apparently inconsistent with, and subversive of, the above

principle is the doctrine enunciated by the Privy Council, namely, that a son does not acquire by birth any right to an impartible ancestral estate in possession of the father, so as to become his co-owner and to prevent an alienation by the latter, of an important and valuable portion of the estate (*Sartaj Kuari v. Deoraj Kuari*, 15 I. A. 51).

‘But it should be observed that there cannot be survivorship without co-ownership and joint tenancy; and one co-owner alone is not competent to alienate that which is the subject of joint tenancy and co-ownership. The correct view seems to be, that the holder of the estate has no more interest in the estate than the other members, but by virtue of his position as the holder of the estate he has full control over the surplus income for his life.

‘The alienation of a portion of an impartible estate by the holder thereof would be contrary to the very nature and character of the tenure of such property; for if such transfer were allowed, it could not be effectuated except by partitioning that which is *ex hypothesi* impartible. If therefore it cannot be alienated in part, it would follow *a fortiori* that it cannot be alienated in its entirety. Inalienability therefore appears to follow as the necessary logical consequence of impartibility. The policy of the law, or of the grant, or of the family arrangement, by which an estate was originally made impartible, cannot but be taken to intend the continuance of the corpus of the property intact in the hands of the successive holders thereof. The object of excluding all the other members of the family from participation in the estate cannot reasonably be taken to be any other than its preservation in entirety without diminution. To prevent the ordinary law of inheritance to take its course, by depriving all the other heirs of equal enjoyment, for the purpose of making the estate indivisible, and at the same time to allow the holder to destroy or divide the property according to his pleasure, and so to undo the whole scheme, would be two most incongruous and inconsistent things, that cannot reasonably be reconciled. The absolute power of alienation in the holder of such property is not only contrary to the spirit of Hindu law, according to which immovable property cannot, as a general rule, be alienated except for justifiable special causes, but is also opposed to the doctrine of survivorship held to be applicable to these estates in certain circumstances.’

There can be little doubt that the passages quoted from Pandit Siromani and Baboo Golapchandra, and not the doctrine enunciated in the judgment of the Privy Council in 1888, represent the Hindu view of their own law and also the living customary rules or laws by which Hindus of the Mitakshara school regulate their lives and properties. And it is to be feared that the persistent refusal by the Judicial Committee to recognize the right of the family in ancestral estates will not tend to strengthen the confidence of the people in the administration of justice.

This was the state of the case law and of native opinion at the beginning of last year, and it is well to note here that down to that time the Judicial Committee had never upheld a sale or gift of the lands of an impartible ancestral estate governed by the Mitakshara law by the head of the family *from the family to a stranger*. It is true that in 1888 they had used words which indicated that in their opinion such an alienation was within the power of the head of the family, but as in that case the property was not alienated *from the family* it might have been possible to argue that these expressions of opinion were obiter only.

On February 24, 1899, the judgment of the Committee was delivered by Sir Richard Couch in the case mentioned at the beginning of this paper, which, as far as the Courts are concerned, has swept away the last distinctive feature of the Mitakshara joint family.

The facts of the case, as far as they can be gathered from the judgment, are as follows. The Raja of Pittapur, a Hindu governed by the Mitakshara law, was in his lifetime in possession of an ancestral impartible estate situated in the Madras Presidency. At a time when he had no aurasa or legitimate son of his own he made a valid adoption, according to Hindu law, of a boy who was the plaintiff in the suit. Afterwards the Raja was induced to believe that a younger boy, who had been introduced into his house, was his own aurasa son, that is to say his own son by a lawfully married wife. In this belief the Raja remained until his death. The boy was not in fact the son of the Raja, but had been imposed upon him by a fraud. If the younger boy had been the aurasa son of the Raja and the Raja had died intestate, he would have been entitled, under the Hindu law, to succeed to the possession of the impartible ancestral estate, and the adopted son would have been entitled to be maintained out of the income of it. As the younger boy was not the son of the Raja the adopted son would have succeeded to the impartible ancestral estate, and the younger boy would not have been entitled to anything at all, as he was in no sense a member of the family. After the younger boy had been imposed upon him, the Raja executed two documents to the same effect. One in Telegu and the other in English. In the documents themselves the Raja described them as wills, and Sir Richard Couch in his judgment quotes from them as follows:—

‘Though it is not specially necessary, according to Hindu law, that property should be passed to the aurasa son by means of a will, I have written this will to declare my opinion to all people that I have, according to Hindu law, passed the property to my aurasa son without property being disturbed. It is hereby settled

that my entire property should go to my aurasa son Kumara Venkata Sarya Rao, and that cash allowance, settled already to be paid to my adopted son Venkata Mahipati Sary Rama Krishna Rao, the second son of Raja Venkatagiri, according to his desire, should continue to be paid.'

The judgment goes on to mention two later wills of the Raja, but it does not quote from them, and they seem to have been to the same effect as the earlier ones. It appears strange to us that a man should execute a document, and call it a will, merely to say that he is satisfied that his property should go to his legal heirs; but such a thing is not at all uncommon with the Indian people, and it is very certain that all which the Raja intended to do was to express his satisfaction that the ancestral estate which was in his possession would pass at his death in the legal order of succession to his aurasa son, as it would have done if he had not executed any testamentary document at all. It is equally certain that nothing could be further from the thoughts and wishes of an orthodox high-caste Hindu Raja than an intention to give the Raj estate away from the family to a person of whose origin he knew nothing, who was probably of a different caste to himself, and who certainly could not effectually perform those rites after his death, without which his soul could not enter the abode of the blessed. Sir Richard Couch dismissed the argument that it was not the intention of the Raja to give the Raj estate to any one but his legitimate successor with the remark: 'Their lordships are of opinion that there is a gift by the will to the second respondent, and that the false description which must for the present be assumed does not vitiate it.' The judgment then goes on to dispose of the question whether the person in possession of such an estate could give it away from the family by will to a stranger by saying that the question is concluded by the judgment in the case decided in 1888.

If the history of this estate since the judgment of the Judicial Committee were obtained from the collector of the district it would be very instructive, and would throw great light on the question whether the Privy Council or the Hindus themselves are right in the view they take of the Hindu law. The person to whom the judgment has given the estate has been found by the Court of first instance not to have been the son of the deceased Raja, and, as there is no finding whose son he is, it must be assumed that he is a stranger to the family. Consequently, as far as the judgment is concerned, the family are left entirely destitute, and the ancestral estate has become the sole and absolute property of a person who is under no obligation of any kind to maintain it, or any of its members, or to uphold its dignity, or to keep the property intact.

If the collector were asked for the subsequent history of the family and the estate, I would venture to predict that it would be found that Hindu custom or feeling or law had been stronger than the law of the English judges ; that the family was still a joint family, all living on the ancestral estate as before, and that the only effect of the judgment has been to confirm the position of the younger boy as the titular Raja and head of the joint family. In other words, the matter will have been treated as if the finding of fact had been reversed, and the younger boy had succeeded as the son of the late Raja and not as a devisee under his will.

The customs and laws by which Hindus of the Mitakshara school are accustomed to regulate their lives and properties are well known to a great many people. Every member of the Indian Civil Service, who has been in charge of a district in a part of the country in which the Mitakshara law prevails, is quite well acquainted with them, and there are not a few gentlemen in the India Office who must be perfectly familiar with the subject.

W. C. PETHERAM.

THE GERMAN CODE AND PRIVATE INTERNATIONAL LAW.

WHILST in the draft Code, under the heading 'Application of foreign laws,' international law was classed by itself, and as a constituent part of the system; the final code has relegated it to the 'Introductory Act,' and deals with it among other 'general provisions' in five and twenty sections¹. These do not pretend to be an exhaustive treatment of the matter, and their principal object is manifestly to establish the dominion of German law for German subjects. Most of the provisions are accordingly devoted to the assertion of that principle—whilst the converse, viz. the demarcation of the sphere of influence of foreign law as regards foreigners, which, on the face of it, was to form the keynote of the above-mentioned chapter in the draft Code, is now presented in rather an emaciated shape. As to the reasons which have led to this *volte-face* we know nothing directly, since no 'motives' in connexion with this Act have been published; but it may be presumed that diplomatic considerations, making it desirable to leave unhampered as much as possible the freedom of action in the conclusion of treaties, have determined this course.

The great change which the Act introduces is this, that it proclaims as the criterion of the personal statute the principle of nationality in the place of that of domicile, which has so long subsisted in the common law of Germany and nearly all the laws of the particular states. That principle is therefore to govern the status and capacity, the law of family and of inheritance; while, on the other hand, the law of property and of contract will as heretofore be regulated on the basis of *lex rei sitae* and *sedes obligationis*.

I may be allowed as briefly as possible to summarize the enactment:

Though the capacity of a person, as stated above, is governed by the law of the state to which he belongs, yet a foreigner who acquires German nationality after having attained his majority, remains *sui juris*, even if he should not yet be so according to German law; and where a foreigner enters in Germany into a transaction in respect of which he would not be capable, according to his

¹ Einführungsgesetz, sect. 7-31.

personal statute, he will be deemed capable to the extent to which he would be so according to German law (sect. 7).

A curator¹ may be appointed to a foreigner if he has his domicile or residence in Germany (sect. 8).

A foreigner who has not been heard of for a certain period², as prescribed by the Code, may judicially be declared to be dead as regards that part of his property which is subject to German law; and, if such a person was married to a German wife, the latter may obtain a declaration of death (which would be tantamount to a dissolution of her marriage, and enable her to contract another valid marriage), (sect. 9).

A foreign society (not being a commercial company with which the Act does not deal) can only acquire legal personality by virtue of a decree of the Federal Council (sect. 10).

The form of a transaction is determined by the law which governs the subject-matter of the transaction; or, optionally, by the law of the place where it is made. The latter alternative would not apply to transactions by which *jura in re* are acquired (sect. 11).

Delicts committed abroad will not support larger claims against a German in a German court than the German law would admit (sect. 12).

Sections 13-17 refer to marriage and divorce. Where one of the parties is a German subject, the marriage, as regards each of them, is governed by the law of the country to which he or she belongs. The same principle applies in the case of foreigners who contract a marriage in Germany. The form of a marriage contracted in Germany is always governed by the German law. The personal relations between a German husband and wife (cohabitation, duty of the wife to follow her husband, protection of the wife, &c.) are determined by the German law, even in the case of a foreign domicile. Where the husband was a German subject at the time of the marriage, the property relations will be governed by the German law. Where a husband after his marriage becomes a German subject, or where a foreign husband and wife have their domicile in Germany, their property relations, in order to be valid against third parties, must, in so far as they differ from German law, be entered in a public register kept for that purpose.

The judicial dissolution of a marriage is subject to the law of the state to which the husband belongs at the time of the commencement of the suit. But, in case of a change of nationality, any fact which may have occurred prior to it cannot be pleaded, unless

¹ A curator can be appointed to a major in case of lunacy, mental weakness, prodigality, or habitual drunkenness (sect. 6 Civil Code).

² In ordinary cases ten years must have elapsed since an absent person was last heard of (sect. 14 et seq. Civil Code).

both the law of the former and the law of the subsequently acquired nationality recognize it as a ground for dissolution; and, if the suit be based on foreign law, a marriage can only be dissolved if that law as well as the German law will warrant a dissolution.

The legitimacy of a child is governed by the German law where the husband was a German subject at the time of its birth, or, if dead, was a German at the time of his death. The legal relations between parents and a legitimate child, and between the mother and an illegitimate child, are determined by the German law, if the father or the mother respectively is a German subject. The obligations of the father of an illegitimate child are regulated by the law of the country to which the mother belongs at the time of the child's birth (sect. 19, 20, 21).

Section 22 contains some provisions concerning the legitimation of an illegitimate child.

Guardianship or curatorship over a foreigner can be ordered by a German court, where the state to which he belongs does not undertake the necessary care (sect. 23).

The succession to the property¹ of a deceased German subject, notwithstanding a foreign domicile, is governed by German law; whilst the succession to a foreigner's estate, notwithstanding his German domicile at the time of death, is governed by the law of his country (sect. 24 and 25²).

The above provisions respecting the property relations between husband and wife, parents and children, and succession on death, do not apply to property situate abroad, and for which the *lex rei sitae* provides otherwise (sect. 28).

If a person belongs to no state, the law of his last nationality, and in the absence of a nationality, the law of the domicile, or if without such, that of his residence at the relevant time would represent his personal statute (sect. 29).

In every case³ in which this enactment provides for the application of a foreign law, and in fact that foreign law provides for the application of German law (as *lex domicilii*), the latter shall be applied (sect. 27). The meaning of this provision, which is of considerable general importance, is, briefly speaking, this, that

¹ There is no distinction made between real and personal property.

² The latter principle, as expressed in sect. 25, is followed by a rather complicated exception in favour of claims by Germans according to German law, which, however, are not admissible in cases where the law of the foreigner's country would apply exclusively German law to the distribution of the estate of a German domiciled within its jurisdiction.

³ Capacity, marriage, property relations between husband and wife, divorce and succession on death. See above.

where the subject of a foreign country, the law of which recognizes the *lex domicilii* (and not the *lex originis*) is domiciled in Germany, the German law will treat him as if he were or had been a German subject. The effect will be that the German courts will deal in one way with Frenchmen, Austrians, Italians, &c., they being subject to the law of nationality, and in another way with Englishmen, Americans, &c.

The principle of retaliation, which the law of Germany had already adopted in respect of foreign judgments and foreign creditors in bankruptcies, is conditionally provided for in sect. 31. It is made dependent upon a decree issued by the Imperial Chancellor, and sanctioned by the Federal Council, and is therefore not left to the opinion of the courts, as is the case with the enforcement of foreign judgments.

On the other hand, the widest scope is given to judicial discretion by sect. 30, which runs thus: 'The application of a foreign law is excluded if such an application would infringe on morality, or the object of a German law.' This *clausula generalis* has already given rise to some controversy¹. It is considered to be questionable policy to give the judges *carte blanche* to such an extent, and the apprehension is expressed that it may justly lead to reprisals, even from quarters where legislation has hitherto resisted that principle.

JULIUS HIRSCHFELD.

¹ [Dicta to the like effect are to be found in English judgments of authority, but it is doubtful whether they were necessary to the decisions, and still more doubtful whether they would be acted on to the full extent of their terms. They are generally taken as a saving of the right to make exceptions to the application of foreign laws in extreme cases which, as between civilized nations, can hardly ever happen.—Ed.]

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

Investigation of Title, being a practical treatise and alphabetical digest of the law connected with the title to land, with precedents of requisitions.

By W. HOWLAND JACKSON and THOROLD GOSSET. Second Edition.
London: Stevens & Sons, Lim. 1899. 8vo. lii and 490 pp.
(12s. 6d.)

Precedents of Purchase and Mortgage Deeds, being a companion volume to the above. By the same AUTHORS. London: Stevens & Sons, Lim.
1899. 8vo. xiv and 199 pp. (7s. 6d.)

THE rapid sale of the first edition of the volume dealing with investigation of title shows that the authors have produced a book which the profession find useful.

The present edition has been fully revised and to some extent enlarged; and we notice that the matters to which we called attention in our review of the first edition have been carefully considered. However the authors seem to retain their opinion (p. 180) that section 1 of the Land Transfer Act, 1897, applies to estates tail.

It remains to see whether the little book of precedents of purchase and mortgage deeds will be as great a success as its companion volume.

There can be no doubt that the system of severing the precedents from the notes and merely giving references to the dissertations in footnotes is for many purposes convenient; but whether there is really any demand for a book confined exclusively to purchase and mortgage deeds is open to doubt.

With so many existing standard books on this subject, the authors must have found it difficult to strike out a line of their own. To this must be attributed the want of crispness which sometimes appears in the drafting.

There is a very general opinion that so far as practicable conveyancers should endeavour to protect trustees from risk, and to give them as little to do in connexion with the trust as possible; in the face of this it seems strange that the authors (p. 39) should suggest that the trustees as well as the tenant for life should, where the latter sells, give covenants for title. The trustees cannot under their power sell without the consent of the tenant for life; hence his covenant for title is sufficient.

In using this book a solicitor would have no difficulty in giving directions as to what should be copied, but as a whole it seems to us that the book is better adapted to the requirements of students and articulated clerks than of any other class of persons.

B. L. C.

Principles of the English Law of Contract. By Sir WILLIAM R. ANSON, Bart. Ninth Edition. Oxford: at the Clarendon Press; London and New York: Henry Frowde. 1899. 8vo. xxxvi and 391 pp. (10s. 6d.)

THE principal new feature in this edition is the short explanation at an early stage (pp. 11, 12) of the general nature of remedies in matters of contract. We do not doubt that this will be welcome and 'useful to beginners in the subject. Only we must humbly protest that the use of such terms as 'sharp practice,' which are unknown to the law, and can have no meaning in a court of justice, except on a purely discretionary question such as that of allowing or disallowing costs, does not tend to make things easier for novices in the end. Since the student by the time he comes to the very troublesome case of *Dickinson v. Dodds*, p. 37, will now know the difference between damages and specific performance, it might be well in the next edition to point out that, although only the House of Lords can overrule that decision, it was not actually decided that the plaintiff had no contract, but only that he could not have specific performance. Recent cases appear to have been diligently noted down to the latest possible date.

Advanced learners will continue to regret that Sir W. Anson's discussion of many interesting points is so brief. But this is unavoidable if the book is to remain of a size and character suitable for elementary instruction; and for students of the elements we certainly think it is better to stimulate their intelligence by calling attention to disputable questions of principle, however briefly, than to leave such things alone on the ground of want of space.

A Treatise on the Law of Bills of Exchange. By the Right Hon. Sir JOHN BARNARD BYLES. Sixteenth Edition by MAURICE BARNARD BYLES and WALTER JOHN BARNARD BYLES. London: Sweet & Maxwell, Lim. 1899. 8vo. lxx and 582 pp. (25s.)

BYLES on Bills belongs to that small class of text-books which are so good as to be almost beyond the range of criticism. Editors of such books are under a heavy responsibility to the profession. To introduce the modifications necessitated by recent decisions without unduly departing from the approved text of the author is no easy matter. The method too often adopted in such cases is, where a proposition of law has become obsolete, to change the present tense into the past, and then introduce the altered law with some such expression as 'but now.' This method is irritating to the reader and only permissible where the historical development of the law is thereby made plain. Another and hardly less vicious method is to leave the text unaltered and add the new matter to the notes. The editors of Byles on Bills incline to both methods. They have noted up the former edition with diligence, but they have not ventured to modify the text in accordance with recent decisions, and the new points are hidden away in the notes, instead of being exposed in the text. Thus *Bank of England v. Vagliano*, *Clutton v. Attenborough*, *Scholfield v. Earl of Londesborough*, *Decroix v. Meyer*, and *In re Soltykoff*, which are among the most noticeable cases of the last ten years, seem to have called for no alteration in the text, and even in the notes their effect is inadequately set forth.

Vagliano's case (which, by the way, is wrongly cited as *Vagliano v. Bank of England*) is worked in at the end of a very long note upon the question

whether it is material that the acceptor of a bill does not know that the payee is a fictitious person. No reference at all is made to the far-reaching effect of Lord Herschell's rules for interpreting a codifying statute by reference to the pre-existing law, nor to Lord Halsbury's admirable explanation of the meaning of the term 'fictitious person,' though these are the two matters which make the case important, and upon which the House of Lords differed from the Court of Appeal.

The two or three pages of discussion of the liability of infants on bills might now be reduced to a single sentence since the decision of *In re Soltykoff*.

It is unfortunate that the edition was not held back long enough to introduce the effect of the Finance Act, 1899, in its proper place instead of in the preface—a place where one does not usually look for *addenda et corrigenda*.

If Byles on Bills is to hold its place in the esteem of lawyers it must be re-edited and not merely noted up.

Model By-laws, Rules, and Regulations, under the Public Health and other Acts. By WILLIAM MACKENZIE and PERCY HANDFORD. London: Shaw & Sons and Butterworth & Co. 1899. La. 8vo. Vol. I, xxxii and 597 pp. and 20 plates; Vol. II, xiv and 218 pp. (25s.)

MANY of the Acts of Parliament by which our system of Local Government has been established give to the local authorities limited legislative powers in addition to their administrative functions. But in most cases the by-laws by which the legislative power is exercised have no validity until they have been confirmed by the Local Government Board. It appears to be the policy of that Board to secure a large measure of uniformity in the codes of the various local authorities, and to that end they have issued model by-laws applicable to nearly all the subjects to which by-laws coming before them for approval relate. This policy, though possibly it somewhat fetters the independence of the local bodies, has manifest advantages. The local bodies get the benefit of the experience and good drafting of the experts who advise the Board; acquaintance with the by-laws of one district enables a person quickly and easily to become acquainted with those of another; and legal decisions on the effect of a by-law are often conclusive upon the interpretation of similarly expressed by-laws in other places.

Most of the models issued by the Board appear to be excellent in form and have been found to work well in practice. In the case of others improvements might be suggested. Thus the regulations for letting allotments by a Parish Council would be made much more useful if they contained clear provisions with regard to breaking up permanent pasture, removing trees and shrubs planted by the tenant, compensation, sub-letting and building on the allotment. These are just the things the tenant wants to know. The law upon them is scattered about in several Acts of Parliament. If it was embodied in the regulations or the agreement for letting, the tenant would have the information in an easily accessible form. Absurd and wholly inappropriate restrictions on building in country districts have been known to follow from the unthinking application of forms obviously intended for urban use, but we presume the Board is not answerable for this.

Messrs. Mackenzie and Handford have issued the Board's Model By-laws and Regulations together with some models suggested by themselves, and they have added explanatory notes and a general introduction. The notes appear in many cases to be very wide of the mark, and not always accurate.

Thus with regard to Allotments. They say that allotments let by a Parish Council can only be let to persons belonging to the labouring population, giving as their authority s. 2 (1) of The Allotments Act, 1887. That section, however, does not apply to land hired by the Parish Council for allotments, and we know of no similar limitation applicable. The authors do not appear to appreciate the important differences between allotments provided by District Councils under the Act of 1887, and those provided by Parish Councils under the Act of 1894. What is the authors' authority for saying that the Chairman and Parish Councillors must *seal* the regulations? We fail to see what s. 182 of the Public Health Act, 1875, has to do with the matter, and s. 3 (9) of the Local Government Act, 1894, seems to make their signatures sufficient.

A lengthy note on Markets contains a considerable amount of miscellaneous information which has very little to do with by-laws, and is open to a good deal of criticism. The authors begin by quoting the ludicrous definition of a market given in the Report of the Royal Commission on Markets and Fairs, a source to which they seem to have gone for much of their law. Is it from the same source that they get the statement that 'tolls proper are leviable on the goods brought into a market for sale'? It has been said in an old case that by special custom toll may be leviable on all goods brought into a market (*Leight v. Pym*, 2 Lutw. 1336), but there can be no doubt that the usual common law toll is properly payable only on articles sold in the market.

The section on Disturbance of a Market seems to consist largely of an indiscriminate collection of extracts from the headnotes of reported cases; and without explanation they produce some startling results. Jessel M.R. and the Lords Justices on Appeal certainly did not decide in *Elwes v. Payne* (12 Ch. D. 468) that 'a market held on a Monday is in these days *prima facie* an injury to a market held on the Thursday,' though the headnote in the Law Reports lends some colour to that view.

Another example of headnote law is the statement that 'It is essential to the complaint of an old market against a new one set up near it, that the old one was competent to the accommodation of the public (*O'Reilly, ex parte* (1790), 1 Ves. J. 114; 1 R. R. 89).' This statement is identical with the summary of the case in Mews' Digest, which again is practically a reproduction of the side-note to the report of the case in 1 Vesey Jr. at p. 114. We notice also that our authors follow Mr. Mews' spelling of O'Reily in preference to that of the reporter. The side-note in Vesey Jr. is founded on an *obiter dictum* of Lord Thurlow in the course of his observations upon the hearing of an application for a patent for a new opera house in London. If Lord Thurlow had meant that to an action for disturbance of a market by setting up a rival market, it is a good defence that there is not room in the old market, as our authors seem to suppose, the dictum would be worthless in the face of the decision of the House of Lords in *Great Eastern Railway Co. v. Goldsmid*, 9 App. Cas. 927. In any case an off-hand dictum in an unargued case is not of much value; but, in fact, all that Lord Thurlow meant was that an owner of a market cannot successfully oppose the grant of a new market near his own, if the old market fails to provide sufficient accommodation for the public. Even in this sense the proposition is too wide, and no one would now contend that it is good law (see

Opinions of the Judges on the *Islington Market Bill*, 3 Cl. & F. 513, 39 R. R. 32).

One more example must suffice. The headnote to the report of *Mayor of Dorchester v. Ensor* (L. R. 4 Ex. 335) contains the statement that—'a market held in the same town with an old market, if held upon the same day, is a disturbance by intendment of law'; and this statement is adopted by Messrs. Mackenzie and Handford. It is not clear why the reporter in his headnote used the words 'in the same town' instead of 'near' (as alleged in the pleadings), especially as the Court emphatically laid it down that 'a market may be disturbed by holding another market near, *whether the new market so held be within or without the borough*.' The only limitation is that the distance between the new and the old market must be not more than seven miles (see *Yard v. Ford*, 2 Wms. Saunders, 172, and *Islington Market Bill*, 3 Cl. & F. 513, 39 R. R. 32), a matter to which the authors make no reference.

It would, perhaps, be unfair to take the note on Markets as a fair sample of the whole work. It contains other mistakes than those we have pointed out; but the subject is a thorny one on which the writer should tread with circumspection, putting not his trust in headnotes and digests.

It may be hoped that the notes on the other topics with which the authors deal are more carefully prepared, as they are less ambitious in their scope. The collection of model by-laws will no doubt be useful to local bodies. It is more complete than any other similar collection that has come under our notice.

Unwritten Laws and Ideals of Active Careers. Essays by Sir Edward Malet, Sir Reginald Palgrave, Major-General Maurice, Sir Herbert Stephen, G. F. Watts, R.A., Lord Monkswell, Augustine Birrell, M.P., and others. Edited by E. H. PITCAIRN. London: Smith, Elder & Co. 1899. 8vo. x and 358 pp. (7s. 6d.)

THE title of this book might have been 'Customs of Professions,' or the like, but for its inclusion of some callings or stages of life which no single term will cover. It is hardly a profession to be in either House of Parliament; it is not a profession to be Vice-Chancellor of either University; still less to be a boy at a public school. Hence the somewhat vague title as it stands, which however is made clear by the Preface.

The chapters which concern us are those on the Judges, by Sir Herbert Stephen, and on the Bar, by Mr. Augustine Birrell. Sir Herbert Stephen is more directly instructive, Mr. Birrell more literary and discursive. Both may be safely trusted by the lay reader, who will find, especially in Sir Herbert Stephen's chapter, many facts and explanations which could hardly be found in any other one book. Sir Herbert Stephen considers, amongst other things, the paramount precedence of a Justice of Assize, and accounts for it by the fact that his commissions and writ of assistance put him above the sheriff, who otherwise disputes the first place in the county with the Lord-Lieutenant. As we heard this explanation many years ago from the late Mr. Justice Willes, we have no doubt that it is right. Willes J. was also of opinion that, if it came to deciding between the sheriff and the Lord-Lieutenant, the sheriff must prevail by reason of the antiquity of his office; the Lord-Lieutenant, though of respectable standing, being after all only a statutory commissioner of array.

Mr. Birrell genially dispels—not for the first time, but not superfluously—the current legends and prejudices about the profession of an advocate.

There is one passage of Sir Herbert Stephen's from the literal reading of which it might be inferred that either he does not know the age of Domesday Book, or he supposes it to be kept at the British Museum; but this amounts to no more than laxity of expression in a matter collateral to the writer's main purpose.

Yearly Supreme Court Practice. By M. MUIR MACKENZIE, S. G. LUSHINGTON, and J. C. FOX. London: Butterworth & Co. 1899. 8vo. cxxxi and 1002 pp. (20s. net.)

THIS publication reappears in an improved form. The note on attachment and committal which has been substituted for the former one is a model of conciseness and accuracy. In addition to the statutes and decisions subsequent in date to the last edition, the practitioner will now find the Settled Estates Act Orders, 1878, and the Judicial Trustees Act, 1896.

Instead of servilely reproducing the forms to the Settled Estates Act Orders, one would have thought that the editors were not undertaking a very serious responsibility in substituting 'Mr. Justice' for 'Master of the Rolls' and 'Vice-Chancellor,' a course which they point out in footnotes should now be adopted. A reference should have been made to the observations of Stirling J., in *In re Stuart* [1897] 2 Ch. at p. 588, respecting the time and mode of application by a trustee for relief under the Judicial Trustees Act, 1896, s. 3. That was a case where the proceedings were instituted by Originating Summons; where proceedings were commenced by writ the benefit of the section has been claimed by the defence: *Perrins v. Bellamy* [1897] 2 Ch. 521, *In re Gridley* [1897] 2 Ch. 593. In the former case the trustee was relieved, and the beneficiary had to pay the costs of the action, and of an unsuccessful appeal, [1899] 1 Ch. 797.

The Law of Account. By SYDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 1899. 8vo. xxviii and 315 pp. (10s.)

It is to be regretted that a little more time or care was not bestowed upon this work. We are told that a judgment should contain a submission to account, and the case cited only goes to the fact that a statement of claim need not contain a submission to pay. *Lever v. Goodwin* and *Saxlehner v. Apollinaris Co.* are dealt with as trade mark cases, and not as passing-off cases. This is the less excusable, as the body of the report in *Lever v. Goodwin* expressly mentions, within the first six lines, that 'the case as to the trade mark failed.' 'Bill' and 'chief clerk' appear for 'statement of claim' and 'master.' The author has omitted all reference to taking accounts in cases of waste, and between tenants in common, joint tenants, and co-sureties. These matters may be outside the scope of the work, but their absence does detract from its utility. The author's abbreviations are not to be commended. *Rhymney Ry.* and *Neuchatel Co.* are as short as *Rhymney, &c.* and *Neuchatel, &c.*, and more lucid, whilst *Crompton v. Evans, &c.* for *Crompton and Evans' Union Bank, Ltd. v. Burton* must certainly be regarded as unconventional.

A Practical Treatise on the Foreclosure of Mortgages of Realty with the Rules of Practice relating to Foreclosure annotated (and an Appendix of Forms) and the Mortgage Laws of Ontario (being a collection of statutes and sections of statutes relating to Mortgages of Realty). By A. T. HUNTER. Toronto: The Carswell Co., Lim. 1899. 8vo. liv and 444 pp.

THIS volume shows how freely the law and practice of Foreclosure have developed in Ontario from the introduction of equity jurisdiction in 1837 to the consolidation of the Rules in 1897, a period of sixty years. Beginning with a short historical introduction, the author gives a very full and clear explanation of the stages of a foreclosure action, and in the body of his book (Part II) reprints and annotates the principal rules. The work is done with care and judgment, but would, probably, be more serviceable to the student and practitioner if Mr. Hunter had allowed himself wider scope in regard both to forms and rules, and discussed in detail the principles involved in such decisions as *Faulds v. Harper*, 11 S. C. R. 639; *Kelly v. Imp. Loan Co.*, 11 S. C. R. 516; *Pratt v. Bunnell*, 21 O. R. 1. The Mortgage Acts given in Part III are well illustrated by comment and extracts from cases. A second edition will enable Mr. Hunter to make the collection complete by adding and commenting on special provisions of the R. S. O. 1897; e.g. in regard to companies generally, c. 191, s. 49; Gas and Water Cos., c. 199, s. 33; Butter and Cheese Cos., c. 201, s. 17; Railway Cos., c. 207, s. 9, ss. 20-23. In that event his attention may also be directed to the form of rules 379 and 396, and to the heading of the Act respecting interest, p. 362.

T. B. B.

The Law of Trade Marks. By LEWIS BOYD SEBASTIAN. Fourth Edition by the AUTHOR and HARRY BAIRD HEMMING. London: Stevens & Sons, Lim. 1899. La. 8vo. xcvi and 756 pp. (3os.)

MR. SEBASTIAN has done well to bring out, with the help of Mr. H. B. Hemming, a new edition of his excellent work—a book that may fairly claim to be the standard authority on the law of trade marks.

Since 1890, the date of the third edition, there have been a good many decisions on the Trades Marks Acts, and the Acts themselves have been amended in some particulars. The inclusion of these, and of numerous American and colonial cases, has resulted in the book being largely increased in size. Though it has become so encyclopaedic, the excellent arrangement and clear statements of the earlier editions are well maintained, and the reader can extract the principles without finding himself overwhelmed with details. The one fault we have to find is that the type used in Appendix A is too small, and quite unworthy of the matter it contains. The most conscientious reviewer would rebel against attempting to read the notes to the various sections of the Acts therein. The other appendices contain a vast amount of useful matter, Orders in Council, regulations applicable to foreign countries, the law as to Hall marks and Sheffield marks, forms and precedents, all or most of which is difficult to find elsewhere, and the inclusion of which makes the book a complete treatise.

The editors are to be congratulated on the skill and thoroughness with which they have executed their task.

The Law of Railway Companies. By J. H. BALFOUR BROWNE, Q.C., and H. S. THEOBALD, Q.C. Third Edition. By J. H. BALFOUR BROWNE and FRANK BALFOUR BROWNE. London: Stevens & Sons, Lim. 1899. La. 8vo. lxi and 1036 pp. (£2 2s.)

THE most notable feature in the third edition of 'Browne and Theobald's Railway Acts' is the statement in the preface that Mr. Theobald has been unable to assist in the preparation of this edition, and some experience of the book only can enable one to judge whether this loss to the authorship staff has been made good by its reinforcement by calling in the services of Mr. Frank Balfour Browne. So far as the reviewer can ascertain, the new edition will not be found much if at all less serviceable than the two previous ones. It contains 120 more pages than the second edition, an increase in size which is easily accounted for.

The following new statutes have been included in this edition: The Railway and Canal Traffic Act, 1888; the National Defence Act, 1888; the Regulation of Railways Act, 1889; the Light Railways (Ireland) Act, 1889; the Railways (Ireland) Act, 1890; the Railway and Canal Traffic (Provisional Orders) Amendment Act, 1891; the L. & N. W. Ry. Co. (Rates and Charges) Order Confirmation Act, 1891; the Parliamentary Deposits and Bonds Act, 1892; the Railway and Canal Traffic Act, 1892; the Telegraph Act, 1892; the Railway Regulation Act, 1893; the Conveyance of Mails Act, 1893; the Railway and Canal Traffic Act, 1894; the Diseases of Animals Act, 1894 (sections 21-23); the Lands Clauses (Taxation of Costs) Act, 1895; the Railways (Ireland) Act, 1896, and the Light Railways Act, 1896. The book also contains the 1892 Board of Trade Memorandum, as to the documents required before the opening of a railway, &c.; the orders under the Railway Companies Act, 1867, the Orders in Council under the Explosives Act, 1875, so far as they affect Railway Companies, and various other orders and by-laws not contained in the second edition. No apology is therefore needed for the presentation to the profession of a third edition of the book. Several of the new statutes are annotated with the care which has been shown in the notes contained in previous editions. The Workmen's Compensation Act, 1897, has been purposely omitted, and perhaps rightly, as it does not exclusively affect railway companies, and is a subject large enough to be dealt with in a separate treatise. The reviewer has been unable to find any reference by the authors to the Short Titles Act, 1896 (59 & 60 Vict. c. 14), which enables the Railway and Canal Traffic Act, 1854, and certain other Acts down to the year 1894, to be cited as 'The Railway and Canal Traffic Acts, 1854 to 1894,' and the Regulation of Railways Act, 1840, and certain other statutes to be cited as 'The Railway Regulation Acts, 1840 to 1893.'

One should not omit to mention that Mr. T. Waghorn is commended in the preface for the valuable assistance rendered by him to the authors.

F. E.

The Law of Meetings. By GEORGE BLACKWELL. Second Edition. London: Butterworth & Co. 1899. 8vo. xii and 128 pp. (2s. 6d. net.)

THIS book treats, as the preface tells us, of meetings held for lawful purposes, whether social, political, or otherwise (1) by persons under no legal duty to hold such meetings; (2) by corporate bodies to discharge their Statutory or Common Law duties. It gives valuable information as to the

meetings of County Councils, Borough or Town Councils, Rural and Urban District Councils, Boards of Guardians, Parish Councils, Vestries, School Boards, &c. There is also a separate chapter as to the meetings of chartered and other companies. As regards the meetings of companies under the Companies Acts, 1862 to 1893, it should have been pointed out a little more clearly that Table A to the Act of 1862 only applies to companies limited by *shares*, and that in the great majority of these cases meetings of the company and its directors are regulated by individual Articles of Association which exclude altogether or in part the provisions of Table A. It is only fair, however, to the author to say that in the preface to his first edition he frankly states that the book 'only treats incidentally of many points connected with the corporate bodies [referred to in the book], because the law relating to them is already dealt with in the many well-known books relating to such bodies.' The small size of the book and its flexible cover enable it to be easily carried about in the pockets of the many persons who are liable to be called on at short notice to preside at, or in some other way take part in meetings at which it is expedient that order should prevail and legal requirements should be fulfilled. The author has not forgotten to give precise directions as to the duty of the 'chucker-out.' His first edition was sold out within a twelve-month, and a like success may be predicted for the one now under review.

The Rights and Duties of Justices. By R. D. M. LITTLE, C.B., Q.C., Chairman of the Quarter Sessions of Middlesex, and ARTHUR HUTTON. London: Butterworth & Co. 1899. xx and 122 pp.

THIS is a slight sketch of the duties of Justices of the Peace. 'While not for a moment claiming for this book the attributes of Stone's Justice's Manual, we believe that it will prove especially useful to Justices' (Preface). There is a Chapter—I—on the History of the Office. Chapter VI, pp. 70-82, is devoted to the Criminal Evidence Act, 1898; and Chapter VII, pp. 83-106, to the Inebriates Act, 1898. It appears that up to September, 1899, there were only four certified Inebriate Reformatories in existence, which could accommodate no more than 128 persons all told. All of these were for females, and two of them under the Warden, the Victoria Homes, Bristol. There were no State inebriate reformatories, and none for men. The authors dwell much on the Inebriates Act, 1898, which appears to have special interest for them. The two statutes of 1898 mentioned take up 35 pages out of the 122 by no means closely printed treatise on the Rights and Duties of Justices; it is therefore clear that the work is concise, and it may well be taken as an introduction to a large subject.

Loi sur le droit d'auteur au Japon. [1899.] 8vo. 13 pp.

THE following are the main points of the new Japanese copyright law as taken from the presumably official French translation:—Literary copyright carries the right of translation. Dramatic and musical copyright carry performing rights. The duration of copyright in published or publicly exhibited or performed work is for the author's life; or, in the case of the authors being more than one, the life of the survivor and thirty years after. Translation right is lost after ten years as to any language in which the author or his representatives have not published an authorized translation. There is no copyright in official publications, news and, it

seems, leading articles ('faits divers, nouvelles du jour et discussion politique insérés dans les journaux et recueils périodiques'), or proceedings of courts and public meetings. Copyright in other newspaper and magazine articles must be expressly reserved if it is intended to restrain reproduction with acknowledgment. Reproduction of artistic work 'by a different art' is treated as original. Copyright in photographs is limited to ten years, except as to photographs forming part of a book. The date for the commencement of the new law remains to be fixed by an imperial ordinance.

The remedial provisions cannot be fully understood without reference to the Japanese Civil and Penal Codes.

We have also received :—

The Revised Reports, Vols. XLI and XLII. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1899. 855 and 845 pp. (25s.)—These two volumes of the Revised Reports deal with the years 1834–1837 and include cases from 4 Clark & Finnelly, 10 Bligh N.S., 3 Mylne & Keen, 8 Simons, 1 Younge & Collyer, Ex. Eq., 2 & 3 Adolphus & Ellis, 1 & 2 Bingham, N.C., 2 Crompton, Meeson & Roscoe, 1 Moody & Robinson, 4 & 5 Law Journal, N.S., and several volumes of other contemporary reports. In all twenty volumes of the original reports are accounted for in these 1,700 pages, and fifty volumes are dealt with in the five volumes of the Revised Reports issued during 1899.

The Brief of the Legal Fraternity of Phi Delta Phi. Edited by C. F. BOSTWICK, W. R. BAIRD, T. A. PERKINS, G. A. KALTZENBERGER, and C. H. TOPPING. Vol. II. No. 1. Oct. 1899. New York.—This is practically a new journal, as vol. i. was published, as explained in an editorial note, more than twelve years ago. The number contains articles on 'The Political Significance of the case of *Marsbury v. Madison*,' by Dr. C. G. Tiedemann; 'The State Punishment of Crime,' by Mr. Justice Kennedy; 'A Fraternity in Litigation,' by Mr. W. R. Baird; 'The Torrens System of Land Transfers,' by Dr. Harvey B. Hurd; and 'Law in Science and Science in Law,' by Hon. Justice O. W. Holmes.

The Lawyer's Remembrancer and Pocket Book for the year 1900. Compiled by ARTHUR POWELL. London: 'The Printers' Register' Office. Sm. 8vo. 148 pp. (2s. 6d. net.)—We have already spoken of the utility of this little book. A new feature of the present issue is a concise digest of cases reported in the Law Reports during 1899.

English Political Philosophy from Hobbes to Maine. By WILLIAM GRAHAM. London: Edwin Arnold. 1899. 8vo. xxx and 415 pp. (10s. 6d. net.)—Review will follow.

The London Government Act, 1899 . . . with notes and an index. By A. MACMORRAN, S. G. LUSHINGTON, and E. J. NALDRETT. London: Shaw & Sons; Butterworth & Co. 1899. La. 8vo. xxx, 202 and 46 pp. (12s. 6d.)—Review will follow.

A History of the Law of Nations. By T. A. WALKER. Vol. I. From the Earliest Times to the Peace of Westphalia, 1648. Cambridge: at the University Press. 1899. 8vo. xxx and 361 pp. (10s.)—Review will follow.

The Yearly County Court Practice, 1900. By G. PITT-LEWIS, Q.C., C. ARNOLD WHITE, and ARCHIBALD READ. With a chapter on Costs and Precedents of Costs by MOSTEN TURNER. Two vols. Vol. I, General Jurisdiction and Jurisdiction in Admiralty. Vol. II, Enactments conferring Special Jurisdiction upon the County Courts. London: Butterworth & Co; Shaw & Sons. 1900. 8vo. lxxxvii and 896, xxvi and 559 pp. (25s.)

The Law of Stamp Duties on Deeds and other Instruments. By E. N. ALPE. Seventh Edition by ARTHUR B. CANE. 8vo. xxxii and 388 pp. (6s. net.)

The Annual Statutes, 1899. With notes and a summary of the statutes selected. By J. M. LELY. London: Sweet & Maxwell, Lim.: Stevens & Sons, Lim. 1899. La. 8vo. xxviii and 186 pp.

Commentaries on the Procedure of Civil Courts in British India. By HUKM CHAND. Vol. I. Bombay: Bombay Education Society's Steam Press. (Sold by W. Clowes & Sons, Lim., London.) 1899. La. 8vo. xiv and 834 pp. (32s.)

A Practical Arrangement of the Laws relative to the Excise. By NATHANIEL J. HIGHMORE. Second Edition. Two vols. London: Printed for H. M. Stationery Office by Darling & Son, Lim. Sold by Eyre & Spottiswoode. 1899. 8vo. xxxvii and 524, xxxviii and 669 pp. (30s.)

The Lawyer's Companion and Diary and London and Provincial Law Directory for 1900. Edited by E. LAYMAN. Fifty-fourth annual issue. London: Stevens & Sons, Lim.; Shaw & Sons. 1900. 8vo. 620 pp. (7s. 6d.)

The Roman and Roman-Dutch Law of Injuries. A translation of Book 47, Title 10 of Voet's Commentary on the Pandects, with annotations. By MELIUS DE VILLIERS. London: Wm. Clowes & Sons, Lim. Capetown: J. C. Juta & Co. 1899. 8vo. xlii and 327 pp. (42s.)

The Annual Practice, 1900. By THOMAS SNOW, CHARLES BURNET, and F. A. STRINGER. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 8vo. Vol. I. ccxlix, 1048 and 237 pp.; Vol. II. xvi, 695 and 237 pp. (25s. net.)

A Concise Treatise on the Law of Landlord and Tenant. By W. M. FAWCETT. Second Edition by J. M. LIGHTWOOD. London: Butterworth & Co. 1900. 8vo. cxix and 608 pp. (21s.)

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NOTES.

IN *The Paquete Habana, The Lola* (1899) 175 U. S. 677, the opinion of the majority of the Supreme Court of the United States, delivered by Mr. Justice Gray, lays it down as a rule of international law, settled by the general consent of the civilized nations of the world, 'that coast fishing vessels, with their implements and supplies, cargoes and crews, unarmed, and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.' Chief Justice Fuller and Justices Harlan and McKenna dissented, partly on the ground that whatever general usage exists is matter of grace and not of right, partly because they considered that the vessels in question were engaged not in ordinary coast fishing but in wholesale fish trade, and were therefore not entitled to the benefit of the usage. In the face of the talk sometimes heard even in high political places about the law of nations being no true law, it is well to have the sound principle reaffirmed by Gray J. in words from which probably no member of the Court would dissent:—'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.' Whether conventional or customary in the particular case, international law is true law to be administered by regular legal and judicial methods.

H and *W*, both French citizens domiciled in France, intermarry at Paris in 1854. The marriage takes place without any marriage contract or settlement, and is under French law subject to the *régime*

de la communauté. Some years later *H*, and *W* his wife, settle and become domiciled in England, and also become naturalized British subjects. At the time of their settlement in England they are in poverty. Whilst they are in England *H* makes a large fortune in trade. In 1895 he executes a will in the English form disposing of the whole of his property, which consists both of realty and of personality. The succession to *H*'s movable property is, however, governed by the law of France, i. e. by the law of the matrimonial domicile, and not by the law of England, so far as concerns the wife's rights. This is the legal effect of *de Nicols v. Curlier* [1900] A.C. 21, 69 L. J. Ch. 109, wherein the House of Lords reversed the decision of the Court of Appeal [1898] 2 Ch. 60, and restored the decision of Kekewich J. [1898] 1 Ch. 403. The practical result is that *W* has established her title under French law to half *H*'s movable property.

To a student of private international law *de Nicols v. Curlier* is a case of first-rate importance, and suggests several reflections.

1. A question which has hitherto been left open for discussion (see Westlake, *Private International Law*, 3rd ed., p. 68; Dicey, *Conflict of Laws*, p. 650), namely whether the law of the matrimonial domicile governs the rights of a husband and wife to movables acquired after a change of domicile, has now been definitely decided by the House of Lords in the affirmative. Their Lordships have in this matter followed the view of continental authorities, and especially Savigny, as represented among English writers by Mr. Westlake, and have declined to follow a line of American authorities which probably were guided and were certainly supported by Story (*Conflict of Laws*, s. 187).

2. The principle adopted by the House of Lords is in itself sound.

3. In order to arrive at a sound result, their Lordships have distinguished from the case of *de Nicols v. Curlier* the case of *Lashley v. Hog*, 4 Paton 581, though the Court of Appeal thought that the two cases were indistinguishable, and that the principle of *Lashley v. Hog*, expounded in a lengthy judgment by Lord Eldon, was fatal to the claim of the appellant in *de Nicols v. Curlier*. A student of legal history may be allowed to doubt whether the subtle distinction drawn by their Lordships would have commanded the acquiescence of Lord Eldon.

4. The judgment of the House of Lords apparently rests on the principle that when persons domiciled in France marry under the *régime de la communauté*, they in effect enter into a contract which binds the subsequently acquired property of the husband and wife, and is not affected by their change of domicile. But this principle, if logically carried out, applies to immovable, no less than to

movable property, whence the further consequence would appear to ensue that the marriage of persons domiciled in France, or even it may be the marriage of an Englishwoman domiciled in England to a Frenchman domiciled in France, affects the rights of each of the spouses in regard to real property in England. If this be so the firmly-established principle that rights to English land are governed wholly by the *lex situs*, i. e. by the ordinary law of England, though in theory perhaps left untouched, is in effect modified by the decision of the House of Lords in *de Nicols v. Curlier*. The marriage would, on this view, operate as a covenant to settle the land, or its proceeds, in accordance with what may be called the French statutory settlement.

South African Breweries Lim. v. King was treated by the Court of Appeal [1900] 1 Ch. 273, 69 L. J. Ch. 171, as a very plain case, as indeed it was when disengaged from gratuitous and irrelevant complications. The question suggested in our comment on the decision now affirmed (L. Q. R. xv. 341) will have to wait for a more adequate opportunity of judicial consideration.

How subtle may be the distinctions on which a taxpayer's liability may depend will be further seen by any one who studies the *Equitable Life Assurance Society of the United States v. Bishop* [1900] 1 Q. B. 177, 69 L. J. Q. B. 252, C. A., together with *Last v. London Assurance Corporation* (1885) 10 App. Cas. 438, and the *New York Life Insurance Co. v. Styles* (1889) 14 App. Cas. 381.

In these cases the 'simple' question, as the plain man of common sense would put it, which calls for decision is whether the surplus returned or credited by an insurance society to policy holders does or does not constitute annual profits or gains, and therefore is or is not assessable to income tax.

To put the matter broadly, *Last v. London Assurance Corporation* [1895] 10 App. Cas. 438, appears to decide that such a bonus does constitute annual profits or gains, and is therefore liable to income tax.

The *New York Life Insurance Co. v. Styles* appears to decide that such a surplus does not constitute annual profits or gains, and is not liable to income tax, whilst in the *Equitable Life Assurance Society of the United States v. Bishop*, the Court of Appeal follow *Last v. London Assurance Corporation*.

Now the point to be decided is, in fact, as a question whether of economics or of law, in reality a difficult one, and it would be rash to maintain that in the two cases which have come before the House of Lords there were not differences which justified their Lordships in deciding in 1885 that the surplus returned to policy holders was, and in 1889 that it was not, chargeable with income tax, and there

is still less reason to question that the Court of Appeal have rightly thought that in the case before them they were bound to follow the earlier judgment of the House of Lords.

What we do insist upon is, that the distinctions drawn by the House of Lords were extremely fine, so fine indeed that they could not be recognized either by Lord Halsbury or by Lord Fitzgerald. Were it indeed permissible to question the legal infallibility of the final Court of Appeal, a critic might be inclined to agree with Lord Bramwell that their Lordships made a mistake when they gave judgment in *Last v. London Assurance Corporation*, and to add that, under Lord Bramwell's influence in the *New York Life Insurance Co. v. Styles*, they corrected by a desperate effort of logical agility an error of which they could not admit the existence. Some lawyers continue to regret that the House of Lords has bound itself by the dogma of its own infallibility, which appears to have been first enunciated by Lord Campbell in the year 1852.

A's servant wrongfully sells goods of *A*'s to *X*, who purchases them with the knowledge that the servant is dealing with the goods improperly. The servant pays the money received, amounting to about £1,500, into his account at a bank. *A* brings an action against the servant and claims damages for conversion or, in the alternative, for money had and received. Ultimately the action is compromised on the terms of the servant paying £1,125 to *A* in settlement of all claims against the servant without prejudice to any claim of *A*'s against *X*. Before the settlement with the servant *A* begins an action against *X* for conversion of the goods. The defence is raised that by the proceedings in the former action against the servant, *A* has affirmed the sale and has waived the tort, and that therefore the action against *X* is not maintainable. It is held by the Court of Appeal that the tort has not been waived, and that an action lies against *X*.

This is the effect of *Rice v. Reed* [1900] 1 Q. B. 54, 69 L. J. Q. B. 33, C. A. The practical result is satisfactory, but some minds may feel rather more difficulty than seems to have been felt by the Court of Appeal in arriving logically at a conclusion which in the particular instance was substantially just. Vaughan Williams L.J. points out that if in the action against the servant £1,125 had been recovered under a judgment of the Court, either as damages for conversion or as money had and received, it would have been impossible to maintain any action against *X*. But in point of reason it would appear to make very little difference whether the servant pays the £1,125 rather than have the action proceed to judgment, or on the judgment being signed, pays the £1,125 rather

than have his goods seized in execution. In either case *A* does in reality, if not technically, recover £1,125 from the servant on the ground of his having converted *A*'s goods. It may be unreasonable that such recovery should be in any case a conclusive answer to an action against *X*, but if it be allowed to be a defence at all, there is something singularly technical rather than reasonable in the idea that the effect of payment by the servant as regards the liability of *X* depends upon the inquiry whether the payment was made just before or just after the recovery of judgment against the servant.

[This case is independently discussed by Mr. W. H. Griffith in the body of this number.]

P employs his agent *A* to purchase land for him. *T*, a landowner, promises *A* that if *A* can obtain a purchaser of his land for him, he will pay him a commission of ten per cent. on the price paid. *A* induces his principal *P* to purchase *T*'s land. When the bargain was made between *T* and *A*, *T* did not know that *A* was acting as an agent for *P*, but before the contract between *P* and *T* is completed, *T* does know that *A* is acting as *P*'s agent. He does not disclose to *P* the arrangement as to the payment of commission, nor is it in fact disclosed to *P* by *A*. Under the bargain between *T* and *A* the commission amounts to £2,500. By a subsequent and private agreement between *T* and *A* it is reduced to £2,000. *P*, *A*'s principal or employer, has a right to treat the whole £2,500 due to *A* under the original arrangement as in effect his money or, in other words, as a bribe paid to *P*'s agent or servant at *P*'s expense, and can recover it from the agent *A* if it has been paid to him, or from the seller of the land, *T*, if it has not been paid to the agent. This is the effect of *Grant v. The Gold, &c. Exploration Syndicate, Ltd.* [1900] 1 Q. B. 233, 69 L. J. Q. B. 150, C. A. The judgments in the Court of Appeal appear to imply, if they do not positively lay down, that if the whole price paid for the land, as increased by the commission, had been paid to the landowner *T*, who had on his part paid the commission to *P*'s agent *A*, *P* might have recovered the amount of the commission either from *T* the seller or *A* the agent.

This case deserves the most careful attention both of the public generally who have been interested in Sir Edward Fry's and Lord Russell of Killowen's efforts to put an end to secret commissions paid to agents, and of all men of business who, whether as directors, promoters of companies, or under any other name, act as agents for others. It illustrates several points on which it is hardly possible to insist too often.

1. The morality of the law, as regards the duties of agents, is absolutely sound, and rises far above the morality of the business world.

2. An agent's seeing no harm in what he is doing is no defence for acts which are in fact unfair to his employer. Dishonesty does not change its character because it is sanctioned by custom.

3. The whole evil of commissions lies in their secrecy.

It will be observed that all the Lords Justices were of opinion, though they were not called on to decide, that an action for deceit will lie for active concealment of a fraudulent commission transaction such as took place in the present case.

By English law damages are the normal redress for breach of contract; specific performance an extraordinary remedy only to be had in Equity. This rule, now part of the very constitution of every English lawyer, has warped our legal conceptions. Specific performance may not always be practicable, because the Court cannot make *prima donnas* sing or dance, or quarrelsome partners work in harmony; it would only stultify itself if it tried to do so, but this does not alter the fact that specific performance is the natural, the ideal remedy. Damages are a solatium to a man for not getting what he wanted, but a solatium is something quite different from giving him the thing itself for which he bargained. *Hope v. Waller* ([1900] 1 Ch. 257, 69 L. J. Ch. 166, C. A.) is illustrative incidentally of the attitude which English Courts take up towards specific performance as something abnormal and of 'extraordinary jurisdiction.' The case was one of very great nicety. The contract for sale was good; there was no case for rescission; the sole point was whether it was one for the Court specifically to enforce. The vendors were clear of offence; they were ignorant that their tenant had been surreptitiously using the premises as a brothel in violation of the covenant against such user. The purchaser was equally ignorant that the 'eligible investment' had been so discredited. So far the balance of justice, or judicial discretion, was even. What turned the scale in the estimation of the Court of Appeal was that to decree specific performance might expose the purchaser not only to the stigma of being a brothel proprietor, but to a prosecution under the Criminal Law Amendment Act, 1885. The law does not force a man to buy a lawsuit, still less a prosecution. This was a good point forensically, but there was not much substance in it, seeing that the purchaser had the power of getting rid of the obnoxious tenant at once—that in fact the nuisance had already come to an end: Would the argument have prevailed but for that engrained idea which regards specific performance as the exceptional and not the normal mode of enforcing contracts?

A stamp duty case does not promise to raise curious questions of legal theory; but *Muller & Co.'s Margarine, Lim. v. Inland Revenue Commissioners* [1900] 1 Q. B. 310, 69 L. J. Q. B. 291, C. A., shows that it can do so.

What, for example, is a contract made in the United Kingdom?

The answer is that, as far at any rate as the Stamp Act, 1891, s. 59, sub-s. (1), is concerned, a contract is made in the country where the signature of the last necessary party to it is affixed.

What, again, is the locality of such a very intangible kind of thing as the goodwill of a business?

The Court of Appeal reply that where the goodwill of a business is sold for a lump sum, together with the premises where the business is carried on, the goodwill is *prima facie* annexed to the premises; and that, if the premises are situate out of the United Kingdom, the goodwill is to be treated as property locally situate out of the United Kingdom within the meaning of the enactment in question, and therefore the contract for its sale is not liable to stamp duty.

We are not disposed to quarrel with either of these answers, but they suggest two observations. The first is that there is some difficulty in distinguishing satisfactorily between this case and the *West London Syndicate Case* [1898] 2 Q. B. 507, 67 L. J. Q. B. 956, C. A., in which the Court held that goodwill was not locally attached to the premises where the business was carried on; the second is that as a matter of policy it is dubious whether liability to taxation ought to be made to turn upon distinctions which, even though they be rightly drawn, are too subtle for popular apprehension. With regard to the first of these points, it may be suggested that precise locality, such as the difference between one street and another in London, may well be immaterial even where the difference of being in or out of the United Kingdom would be material. The circumstances of the business must of course be regarded in each case.

The Attorney-General v. London & North-Western Railway Co. [1900] 1 Q. B. 78, 69 L. J. Q. B. 26, C. A., exemplifies the well-established principle that a public body such as a railway company which acts under statutory powers can under no circumstances lawfully infringe any term introduced into the Act of Parliament under which it exists, in the interest of the public, and that such infringement may be restrained by means of an information, even though no injury may have actually resulted to the public from the infringement. Hence in the particular case the London and North-Western Railway Company has been restrained from passing over a level crossing at a greater speed than is allowed by Act of Parliament,

although no proof was given that any one had been actually damaged thereby. No doubt in the particular instance and in others like it the restriction may be inconvenient, and this is a very good reason why legislators should not hamper the action either of individuals or of corporations by undue restraints, and why any restriction proved to be noxious or useless should be removed. But the principle that corporations acting under statutory authority are bound at all costs to obey the statute under which they exist is of supreme importance and ought to be rigidly enforced. A dispensing power would be even less tolerable in the hands of railway companies than in the hands of the Crown.

At last the much vexed 'waiver clause' has come before the Court, and, happily, before the Judge of all others most competent to deal with the matter—the Master of the Rolls. The result is a decision qualified in a sense, but as a whole most damaging to the credit of the clause. There may be—the Court admitted—a legitimate use of the clause, where honestly minded directors desire to protect themselves against the indefinite liability attaching under s. 38 to non-disclosure even of immaterial contracts, but this bonâ fide uncertainty is not, as the initiated well know, the purpose for which the clause is employed. It is employed, as it was in *Greenwood v. Leather Shod Wheel Co.* [1900] 1 Ch. 420, 69 L. J. Ch. 131, C. A., deliberately to keep a contract out of the ken of the shareholders, because the promoters or directors dare not disclose it. For this purpose the clause is now worthless, and worse than worthless, because as Lindley M. R. remarked: 'the introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact.' What renders the waiver clause even more hopeless as a fraud protector is that promoters who wish to rely on such waiver must show that the shareholders' attention was called to the facts, which is of course the very thing the inserters of the clause are anxious to avoid. All which goes to show that honesty is really the best policy.

Not one per cent. of intending shareholders, as Byrne J. lately remarked, read the company's articles. Promoters are perfectly aware of this fact and they spin their web accordingly, that is, they too often introduce into the articles very improper clauses, hoping they will escape observation in the crowd—clauses which sometimes purport to protect the promoters and directors from liability for any fraud or misconduct on their part. Even if the clauses are not as unscrupulous as this, they very likely infringe some statutory or common law right of the shareholder. Sooner or

later, however, they come to light, and when he complains he is told that he has tied his hands and can get no redress; and probably hardly any shareholders a year or two ago would have tried to do so—that is, ventured to challenge the validity of such articles. There were the decisions to be faced, which say that a shareholder must be taken to have read the articles and to have understood them properly, and there was the section of the Companies Act (s. 16) to be reckoned with, which declares that the shareholder is to be bound as if he had covenanted under seal. But of late, at the instance of some courageous shareholders, the Courts have been bestowing a much more vigilant scrutiny on articles. In *In re Peveril Gold Mines* ([1898] 1 Ch. 122) the Court disallowed an article derogating from the shareholders' statutory right to present a winding-up petition; in *In re Baring Gould Syndicate* ([1899] 2 Ch. 80, 68 L. J. Ch. 429, C. A.) again the Court disallowed an article which purported to take away the right of a dissentient shareholder on a reconstruction, to have his interest assessed by arbitration under s. 161 of the Companies Act and substitute for it the price which the shares he might have had should have realized in the hands of the liquidator. Now in *Paine v. Cork Co.* [1900] 1 Ch. 309, 69 L. J. Ch. 156, the Court has been defeating a similar attempt to that in *In re Baring Gould* to evade the statutory safeguards imposed on a reconstruction, by giving power to the liquidator under a voluntary winding up to sell the business and assets of the company on terms different to those exacted by sections 161, 162 of the Companies Act, 1862, and, need it be said, not affording the same protection to the dissentient shareholders. These decisions are doubtless helping to educate the shareholder.

X, living at Sheffield, applies for shares in a company whose offices are in London. On the afternoon of October 26 a letter of allotment is made out. About 7 a.m. on October 27 it is taken to the London General Post Office, and given to a postman outside the Office, who does not in fact then post it, and has not authority to receive letters to be posted. It is apparently posted at about 11 a.m. on October 27 and reaches X the same day at 7.30 p.m. Meanwhile X, on the evening of October 26, posts a letter at Sheffield withdrawing his application. This withdrawal was received by the company on October 27 at about 8.30 a.m. The letter of withdrawal being received by the company before the allotment, i. e. the letter of acceptance, is *posted*, there is no contract between X and the company.

This is the effect of *In re London & Northern Bank* [1900] 1 Ch. 220, 69 L. J. Ch. 24. The Court has applied with the utmost

strictness, and, as it appears, correctly, the rule that a contract to be made through the post is not completed until the final letter of acceptance is posted. *X*, it may be added, was in the particular instance fortunate. If the letter of acceptance had been posted at 7 a.m. on the 27th, the contract would have been complete, and he would have been bound thereby.

The case raises, but does not decide, the curious inquiry, whether a letter is received by the person to whom it is sent at the moment when the postman leaves it at his house, or at the moment when he in fact reads it, or at the moment when in the ordinary course of things he might be expected to read it? This casuistry of the Post Office had better be left for the decision of the Court when some case requires its solution.

The incidence of liability for repairs of leasehold property—dilapidations to put it shortly—is at all times a matter which in Bacon's phrase comes home to men's 'business and bosoms,' and *In re Parry and Hopkin's Arbitration* ([1900] 1 Ch. 160, 69 L.J. Ch. 190) possesses a special interest, because the situation there is one likely to recur. In that case leasehold property held under a repairing lease was given by will to *A* for life, with remainder to *B*. *A* dies leaving the premises in a dilapidated state. Has *B* any claim against *A*'s estate in respect of the neglect to repair? North J. has decided that he has not, and he founds his decision on the authority of *In re Cartwright, Avis v. Newman* (41 Ch. D. 532). There a legal tenant for life of freehold land died leaving the buildings upon the land in a dilapidated condition, and in the administration of the tenant for life's estate it was held that the remainderman could not claim compensation from her estate by way of damages for permissive waste: but here there was absent the material element, which was present in *In re Parry*, an express duty to repair. In such a case the tenant for life, as *In re Betty* [1899] 1 Ch. 821, 68 L.J. Ch. 435 shows, takes the property with the burdens imposed, and his estate is liable at the suit of the trustees of the settlement. If so, why not at the suit of the remainderman? As Lord Coke says, 'He that suffereth a house to decay, which he ought to repair, doth the waste.'

Courts of equity discover no disposition to relax their strictness in the matter of irrevocable gifts to persons in a confidential relation to the donor, as *Powell v. Powell* [1900] 1 Ch. 164, 69 L.J. Ch. 164, shows. The doctrine of English law in these cases is based not on any actual exercise of undue influence by the parent, guardian, spiritual adviser, &c., as the case may be, but on the presumption, founded on experience, of the risks of undue influence arising from

the confidential relation. It is open to the donee to show that in the particular case the influence was not abused in his own interest, that the gift was freely made and fairly made, but the onus rests on him to do so, and for this purpose the law, recognizing the subtle atmosphere of influence which surrounds the confidential relation, has wisely established certain definite tests. One is that the donor was completely emancipated from the influence of the donee, but this is seldom relied on. The other is to show that the donor had an antidote to such influence in the shape of independent professional advice. *Powell v. Powell* is valuable as bringing into relief several points not always sufficiently realized. In the first place the solicitor is not an independent adviser if he is acting for both donor and donee. He cannot be, for he has then a divided, where he ought to have an undivided duty. In the next place his duty is not confined to satisfying himself that the donor understands the particular transaction and wishes to carry it out. He must also satisfy himself that the gift is a right and proper one for the donor to make, that is, he must protect the donor against himself, against the impressionability of youth and its generous but imprudent impulses. Finally, the would-be donor must follow the advice given. If he does not, but insists on disregarding it, the rule of protection would be stultified. The solicitor in such a case not only advises—*supplet actatem*.

A mortgagee may stipulate for a collateral advantage without infringing the rule against clogging, provided there is nothing unfair or oppressive in the bargain. This is the new starting point in questions of clogging the equity of redemption. Now the further problem has presented itself, whether the bargain for collateral advantage is valid if it is to go on after the mortgage has been paid off and the security closed. In *Rice v. Noakes* ([1900] 1 Ch. 213, 69 L. J. Ch. 43) Cozens-Hardy J. has held that it is not valid. In that case, as in *Santley v. Wild* ([1899] 2 Ch. 474, 69 L. J. Ch. 681), it was a 'tie' covenant, entered into by a publican with his brewer mortgagor, which raised the question—a covenant which was to run with the leasehold property mortgaged until the expiration of the lease in 1923. The publican had paid off the mortgage, but the brewer's contention was that the tie was still subsisting. How was the retention of such an equitable burden—this was the way the case presented itself to Cozens-Hardy J.—consistent with the reconveyance of the property on the payment off of the mortgage property?—the very idea of a mortgage involving the principle that the mortgagee when paid off should have no interest in the mortgaged premises and no

right to interfere with the mortgagor in his enjoyment or uses of the property. But is this conclusion irrefragable? Once concede that the mortgagee may stipulate for a collateral advantage and there seems no reason why that part of the bargain should not extend beyond the reconveyance. In the case in question the conveyance of the premises was not made a security for the performance of the tie covenant: had it been, the mortgagor would of course have had no right to claim a reconveyance until the end of the period covered by the tie was reached.

Puff. 'Why! by that shake of the head he (Lord Burghley) gave you to understand that even though they had more justice in their cause and wisdom in their measures, yet if there was not a greater spirit shown on the part of the people, the country would at last fall a sacrifice to the hostile ambition of the Spanish monarchy.'

Dangle. 'Zounds! did he mean all that by shaking his head?'

Puff. 'Every word of it.'

Hardly less significant than Lord Burghley's shake of the head was—according to the plaintiff—the letter in *In re Fickus, Farina v. Fickus* [1900] 1 Ch. 331, 69 L. J. Ch. 161. 'You are of course aware,' wrote the prospective father-in-law to his daughter and suitor, the plaintiff, 'that, with my large family, Eliza will have little fortune. She will have a share of what I have after the death of her mother.' There was nothing on the face of it very committing about this, but under the influence of the plaintiff's imagination or his solicitor's constructive genius, these simple words—paraphrased—became this: 'If you, Mr. Farina, will make a settlement on my daughter before her marriage, I will give my assent; and subject only to the rights of my widow, as to which I reserve myself a free hand, I will bind myself to leave her by will an equal share with all my other surviving children, and my property subject only to debts and testamentary expenses.' 'Zounds!' we exclaim with Dangle, 'did it mean all that?' But the colours with which Mr. Farina's hopes had filled in the picture faded sadly in the cold, dry light of Chancery. First, where was that necessary thing, the contract, to be found? All the Court could discover was a representation that the testator was not in a position to make any proposal or give his daughter anything at the time, but that he intended to give her something at his death. Even this surmounted, and a contract found, where was the breach? The daughter did receive a share, though it was not an equal share, as Mr. Farina too easily took for granted. This is where the critical clearness of the lawyer has the advantage of the layman.

A question rather apt to be overlooked in this class of cases is whether the alleged promise could, at the time when it was made, be reasonably regarded as intended to create any legal obligation. Here the words used amounted, when one reads them impartially, to a refusal to make a promise, though a refusal purposely expressed in the mildest form and coupled with an expectation (not a promise) of benefits to come.

‘Really, Mr. —, this is very elementary!’ was a remark which the late Sir George Jessel had occasion to make at times to distinguished counsel, and the remark might well have been made in *In re Stamford Banking Co. and Knight's Contract* ([1900] 1 Ch. 287, 69 L.J. Ch. 127). If anything is well settled in the law of vendor and purchaser and the practice of conveyancers it is that a purchaser, in the absence of special conditions, is entitled to have every deed constituting a link in the chain of the vendor's title abstracted in chief: the introduction of them as recitals in other abstracted instruments is not sufficient. If it were, then, as the late Mr. Dart points out, a copy of the conveyance to the vendor might in many cases take the place of an abstract; besides which the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in the document, but which are not noticed in the recital. All this is very clear to us and very rational, but to future generations who will go about with their title (or someone else's title, as the case may be) in their waistcoat pocket in the shape of a land registry certificate, how will it all appear? It is painful to think what a sorry figure the nineteenth century conveyancer will cut in the pitying retrospect of such a posterity.

The Court of Appeal has held by a majority that where a man makes a contract in his own name, intending in fact, but not to the knowledge of the other party, to contract as an agent, and not having authority at the time, the intended principal can ratify the contract, and acquire the benefit and the burden of it, no less than if the other party had believed himself to be dealing with an agent. In other words, there may be a merely potential as well as an actual undisclosed principal at the date of the contract: *Durant & Co. v. Roberts* [1900] 1 Q.B. 629, 69 L.J.Q.B. 382. The novelty and importance of the decision are shown by the fact that A. L. Smith L.J. dissented in an elaborate judgment.

Earle v. Kingscote [1900] 1 Ch. 203, 69 L.J. Ch. is discussed by Mr. Cyprian Williams under the title of ‘A husband's Liability for his wife's Torts,’ at p. 191 below.

The Court of Appeal has affirmed the judgment of the Queen's Bench Division in *Att.-Gen. v. London C. C.* (see [1900] 1 Q. B. 192, 69 L. J. Q. B. 241) on which we have already commented. The Court of Appeal, it will be noticed, in effect admit that their judgment establishes, as we pointed out, a serious anomaly.

We have noted with amusement and also with amazement the expression by publicists who ought to be better informed of a wish for a list to be laid before Parliament of the rich men who have evaded, as the expression goes, the payment of Estate Duty. The culprits whose names are to be held up for public odium are apparently persons who, having been charged by the Crown with liability to pay Estate Duty, have established on appeal to the Courts that they were not liable to pay it. The evasion is in reality nothing but a refusal to pay an alleged debt which on examination turns out not to be really owing, i.e. not to be a debt at all, and the complaint against men described rhetorically as millionaires is nothing else than that, in common with every other citizen, whether rich or poor, they have objected to pay taxes not imposed upon them by law. No doubt there was once an English king whose law officers maintained that it was criminal for any private subject to dispute the legality of any interpretation by the Crown of its own powers. His name was James II, and the results of his experiment were not encouraging.

Appeals on the construction of the Workmen's Compensation Act, 1897, continue to increase and multiply. It would not be fair to judge the operation of the Act as a whole by the difficulties which arise in disputed cases; and it may well be that, directly or indirectly, the utility of the Act has already justified its existence. But it is certain that in cases where any dispute can be raised the Act has made the law more complicated and doubtful than ever, and that, whatever the benefits may be, this is a serious drawback which ought to be removed by consolidating and simplifying the whole law on the subject.

In the American Law Register for March, p. 132, Prof. Ames of Harvard expresses the opinion of trained American lawyers on the so-called legal education provided by our Inns of Court.

ERRATUM.—January part, page 5, line 9 from bottom,
for 'Quarter Sessions' read 'Court of Session.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MS. on approval without previous communication with the Editor, except in very special circumstances; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

PENALTIES FOR FAILURE TO PERFORM WITHIN
A LIMITED TIME UNDER A SUBSTITUTED
CONTRACT.

I HAVE lately had occasion to endeavour to ascertain the rule of law which governs a provision in a building contract for the payment of a penalty per diem for failure to perform within a fixed time, when the contract has been varied before breach by mutual agreement of the parties to an extent which makes completion within the stipulated time impossible, and I have found the dicta of the text-books uncertain and apparently contradictory. But each dictum is accompanied by a reference to a case, and it would therefore seem that the cases must be more or less inconsistent, or that the authors of the text-books which I have consulted must have failed to appreciate and distinguish properly the cases which they cite. Or it may be that there is not any direct inconsistency between the statements of the text-writers, or in the cases which they cite, but that the facts of all the reported cases are so varied, and are in each instance so essential to the particular decision, that a definite and comprehensive rule capable of unqualified application to other facts cannot be extracted from them. On page 120 of Emden's *Law of Building Leases and Building Contracts*, I find the following passage:—

'We will now proceed to consider what is the effect upon a stipulation in a contract that the builder shall complete the buildings by a specified time, and in default forfeit a certain sum, of a subsequent order by the employer for extra work which necessitates additional time. Subject to any express terms in the agreement, such an order may entitle the builder to claim the time necessary under the circumstances to execute the extra work in addition to that originally fixed, but as regards the stipulation as to time, and in all other respects, the original contract will stand; with the exception that if the order for extra work is so inconsistent with the terms of the original contract that they cannot subsist together, and it becomes impossible to complete the work in the first agreement until the additional work is completed, the subsequent agreement will be held to discharge the former. And consequently, if the employer knew or must have known that the additional work would render it impossible to perform the contract as originally made, the second agreement will operate as a waiver of the stipulation as to time in the first agreement, and a consent that the completion of the work shall be postponed until after the lapse of a reasonable time for carrying out the work as altered.'

This passage appears to be intended to indicate the existence of a definite rule of law which governs the operation of a provision for the forfeiture of a daily or weekly penalty upon failure to complete the contract within the specified time, in a case in which a subsequent order from the employer for extra work necessitates additional time to perform the contract. But I do not think that it clearly states the exact nature and scope of the rule which it purports to express. 'Such an order,' it is said, 'may entitle the builder to claim the time necessary under the circumstances to execute the extra work in addition to that originally fixed, but as regards the stipulation as to time, and in all other respects the original contract will stand; with the exception that if the order for extra work is so inconsistent with the terms of the original contract that they cannot subsist together, and it becomes impossible to complete the work in the first agreement until the additional work is completed, the subsequent agreement will be construed to discharge the former.' Does this statement mean that in every case not coming within the exception mentioned the provision for daily or weekly penalties in default of completion within the specified time remains in force and will commence to operate at the expiration of the additional time necessary to perform the extra work? Or does it mean that the work originally included in the contract must be done within the specified time, and that additional time can be claimed in respect of the extra work only, as the subject of a subsequent and distinct contract? In cases coming within the exception described, the 'subsequent agreement' would not be an addition to the original contract. It would be an entirely new contract substituted for the original one; and the question which immediately suggests itself is how much of the original contract is incorporated or repeated in the new one? The original stipulation to complete within a specified time would undoubtedly be discharged; but, in the event of the contractor not completing within a reasonable time, would the provision for penalties be available to the employer as a term of the new contract or not? The cases cited in illustration of the propositions contained in the passage which I have transcribed are *Legge v. Harlock* (12 Q. B. 1015), *Macintosh v. Midland Counties Railway Company* (14 M. & W. 548), and *Thornhill v. Neale* (8 C. B. N. S. 831). In the first and second of these three cases there was a contract under seal which purported to provide for the events which happened, and the judgment of the Court in each case was substantially confined to the construction of the covenants contained in the deed. In the case of *Thornhill v. Neale* there was an agreement not under seal, and it was decided that

a replication which alleged that the delay of the contractor was caused by the extra work which was the subject of a subsequent agreement, and which the employer well knew at the time of making the subsequent agreement would cause the work comprised in the original agreement to be delayed beyond the time specified for its completion, and that all the work under both agreements had been performed in a reasonable time, was a good legal answer to a counter claim for penalties to complete the work of the original contract within the time fixed for it. This case is not a direct authority upon the question whether a substituted contract which provides for additional work will in all circumstances be held to incorporate or repeat a provision of the original contract for the payment or deduction of penalties in default of performance within a specified period, and to attach it to the implied condition of the new contract that the whole work shall be completed within a reasonable period; but considered in connection with other cases, to which I shall refer hereafter, it may be found to be helpful in the solution of the question.

A similar uncertainty of statement in reference to this question will be found in Hudson's Law of Building Contracts, in which the subject of penalties is very fully discussed, and American and Australian cases are cited in addition to the reported English decisions upon it. On page 148 (vol. I, 2nd edition), it is stated that 'Where a special contract to perform specified work in a specified time has been abandoned or altered, and a new contract in general terms is made, an implied contract arises to do the rest of the work on such terms of the former contract as are implied in new contract; but special terms, such as forfeiture, will not be implied into the new contract.' The principal case cited in illustration of this proposition is the Canadian case of *Hamilton v. Moore* (33 Upper Canada Q. B. 520), in which it was held that a provision for the payment of fifty dollars per week as liquidated damages in default of completion within a specified time was not incorporated into a new and substituted contract, under which the work was commenced after the time fixed for completion by the original contract had expired, and was not applicable to the implied condition of the new contract that the work should be performed within a reasonable time. The case of *Holme v. Guppy* (3 M. & W. 387) is also cited with other English cases in illustration of the same proposition. Again, on page 238, it is stated that the general rule is that 'When the employer orders alterations and departures from the specification, or extra works not provided for by the contract, the builder is released from his obligation to perform by a stated time'; but to this statement the writer adds, 'at all events *pro tanto*, and

proportionately to the delay thereby occasioned.' What do the additional words mean? Do they mean that the contractor is to be allowed sufficient additional time to perform the extra work, and that after the expiration of such additional time the provision as to penalties is to commence to operate? The cases cited in illustration of the text are *Russell v. Sa da Bandeira* (13 C. B. N. S. 149), *Westwood v. Secretary of State for India* (11 W. R. 261), and *Holme v. Guppy* (3 M. & W. 387); and on the next page (239) the case of *Macintosh v. Midland Railway Counties Co.* (14 M. & W. 548) is cited in support of the statement that in cases in which prevention of performance within the specified time is caused by the execution of extra work ordered by the employer the builder should be released *pro tanto*. But none of the cases cited supply a direct answer to the question whether in a case in which additional work has been performed a provision for the payment of penalties in default of performance within a specified time will remain inoperative until the expiration of a sufficient additional time to perform the additional work ordered by the employer, and then become operative in regard to any unnecessary delay.

On page 401 the case of *Kemp v. Rose* (1 Giff. 258) is cited in support of the statement that 'the penalties cannot begin to run if there is no time fixed for completion.' But in that case the date of completion was left blank in the written agreement, and the Court refused to allow the date to be supplied by oral testimony. On the same page it is stated that 'a builder may be released from penalties if there is evidence of an extension of time, or a new implied contract to complete within further time, which, in the absence of any express contract, would mean a reasonable time.' This is the most definite attempt made in the book to answer the question whether a provision for the payment of penalties in default of performance within a fixed time will be incorporated into a substituted contract in which a condition to complete within a reasonable time is implied by law; but no cases are cited in support of the statement on the page where it occurs, and it is expressed in the potential mood, so that the reader is left in doubt whether it enunciates a fixed or a variable rule. On the next page (402) it is stated that 'where additional time is agreed to be allowed for delay caused by additional works, or other delays of the employer, the contractor is not released from payment of the penalties, but merely entitled to recover damages equal to the penalties during the period of delay by the employer, if he completes in a reasonable time.' The cases cited in support of this statement are *Legge v. Harlock* (12 Q. B. 1015) and *Thornhill v. Neats* (8 C. B. N. S. 831). In the case of *Legge v. Harlock* there was only

the one original contract which provided for extra work; but in the case of *Thornhill v. Neats* a second and substituted contract was alleged in the second replication, which was held to be a good answer in law to the counter claim for penalties; and if the last-mentioned case is an authority for the proposition that a provision in a contract not under seal for the payment of penalties in default of performance within a specified time continues in force after extra works, which necessitate delay in completion of the contract, have been agreed upon by the parties, it must be categorically distinguishable in its facts from cases like *Hamilton v. Moore* and *Holme v. Guppy*, and it is clearly contradictory of the proposition that a builder 'may be released from penalties by evidence of a new implied contract to complete within a reasonable time,' if 'may' is to be read as equivalent to *will*. The case of *Hamilton v. Moore* is also cited in Sedgwick On Damages (vol. I, page 611) as an illustration of the proposition that 'a stipulation for liquidated damages in a contract is to be strictly construed.' But this proposition does not necessarily preclude the incorporation or repetition of a provision fixing the amount of damages per day or per week for inexcusable delay in performance in a substituted contract. It therefore becomes necessary to consider the facts in the several cases cited by the text-writers in support of the various propositions to which I have directed attention, in order to ascertain whether all of those cases are illustrative and confirmatory of the same proposition, or are divisible into distinct classes illustrative and confirmatory of distinct but consistent propositions.

In the case of *Hamilton v. Moore* the subject-matter of the contract was a quantity of iron work which was to be supplied and fixed by the plaintiff upon a building to be erected by the defendant, and the defendant did not have the building sufficiently advanced to receive the iron work until nineteen days after the date on which the plaintiff had agreed to complete his contract to supply and fix it. The plaintiff commenced to fix the iron work as soon as the building was ready for it, but he subsequently committed a breach of the implied condition that he would complete the fixing of it within a reasonable time after he was able to commence it, and the Court held that the provision in the original contract for the payment of fifty dollars per week as liquidated damages for any delay in performance beyond the time specified for completion was not incorporated into the new contract under which the work was commenced after the time specified in the original contract for its performance had expired.

In the case of *Holme v. Guppy* the plaintiffs agreed to supply and fix the carpenter's work for a brewery belonging to the defendants

within four and a half months from the date of the agreement, and to forfeit to the defendants £40 per week for each week during which the completion of the work should be delayed beyond the time stipulated for its performance. The defendants were not able to put the plaintiffs in possession of the building until four weeks after the date of the agreement, and the plaintiffs were subsequently delayed a week in the performance of their contract by the fault of their own workmen and four weeks by the default of workmen employed by the defendants. In these circumstances the Court held that the work had been performed under a substituted contract into which the provision of the original contract for the payment of penalties for delay in performance was not incorporated.

In the case of *Russell v. Sa da Bandeira* it was found as a fact by the arbitrator that the delay in completion of the contract was caused by the employer and his agent, and was not attributable to any fault on the part of the plaintiff, and the Court held that the plaintiff was exonerated from the payment of any penalties for delay in the performance of his contract.

These three cases, therefore, come within the rule which was declared by Erle C.J., in his judgment in *Russell v. Sa da Bandeira*, to have been pronounced in *Holme v. Guppy*, viz. 'that where a contractor undertakes, under pain of a certain penalty or forfeiture, to perform a work within a given time, and the performance within the time is prevented by the act of the party with whom he contracts, the contractor is exonerated from the penalties.' In the case of *Thornhill v. Neats* the demurrer admitted the allegation contained in the second replication to the fourth plea, viz. that the delay in completion had been wholly caused by the execution of the additional work performed at the request of the defendant and which he well knew at the time he ordered it would delay the completion of the contract beyond the time specified for it; and in the case of *Legge v. Harlock* the demurrer admitted the allegations of the defendant's plea that a period of nine days was a sufficient time for the performance of the extra work, and that the contractor had delayed the completion of the extra work for a period of twenty-two days longer than the time necessarily required to complete it, and the Court held that the provision for penalties commenced to operate at the expiration of the additional period of nine days which the defendant's plea alleged to be sufficient for the performance of the extra work. The contention of the plaintiff's counsel was that under the agreement for the performance of the extra work the provision for penalties was discharged as soon as the date originally fixed for the completion of the contract without extras had been

properly and necessarily exceeded in the execution of the additional work, and further that the provision for penalties attached only to the covenant to complete at a fixed date, and could not be extended to the proviso for allowing so much time as might be necessary for doing additional work. During the argument Denman C.J. inquired of counsel for the defendant whether there was any case in which the Courts had extended the liability to a penalty where a change had been made in the time for performance, and it was admitted that there was not any direct authority upon the point. The judgment in this case may therefore be regarded as the first reported decision upon the question whether a provision for the payment of penalties for failure to perform within a fixed time can be extended to a failure to perform within a reasonable time; and there is not any conflict between it and the judgment in the case of *Kemp v. Rose*, in which the date for the completion of the contract was left blank in the agreement and the Court refused to allow it to be supplied by parol evidence. In the case of *Kemp v. Rose* the contractors had expressly agreed that no alterations or additions should supersede the conditions for the completion of the whole of the works, and that if the alterations or additions that might be made by the architect should require it, they would increase the number of their workmen in order to complete the whole of the work on or before a date which was left blank in the agreement. The defendants alleged that the contractors had been told verbally the day fixed for the completion of the building, but the Vice-Chancellor regarded the evidence on that point as unsatisfactory and insufficient to introduce an additional term into a written contract. He also stated that 'in all that relates to penalties the Court exercises a very nice and scrupulous judgment'; but there is nothing in his decision to indicate that in an action for damages for not completing within a reasonable time the jury might not be properly directed to assess such damages as would be legally recoverable upon the facts at the same rate per diem or per week, as the case might be, as that at which the parties themselves had assessed them in anticipation in their agreement.

An action was tried a short time ago in the colony in which I write wherein the plaintiff sued to recover damages payable to him under a written agreement by which the defendant undertook to make certain repairs to a ship within a period of forty-eight days, and to pay a penalty of £5 per day for every day during which the repairs remained unfinished after the expiration of that period. The defendant pleaded (*inter alia*) that he had failed to complete the repairs within the stipulated time in consequence of certain additions and alterations directed by the plaintiff to be performed

on the said ship and agreed to by the defendant, which said additions and alterations rendered it impossible, as the plaintiff well knew, for the defendant to complete the said repairs and to supply the said additions within the stipulated time. The jury found that the defendant had delayed the completion of the repairs for several months beyond a period reasonably necessary to complete the whole of the work performed by him under the enlarged contract, and the judge directed the jury that if they found that the plaintiff was entitled to a verdict, the damages should be assessed at £5 per day for every day that the repairs and additions had been unnecessarily and unreasonably delayed. Exception was taken to this direction on the ground that the provision in the original contract for the payment of a penalty of £5 per day for failure to perform within the stipulated time was not incorporated into the new and enlarged contract which included the additional repairs and alterations, and a rule nisi for a new trial was obtained; but the case was comprised and the rule was discharged. I am of opinion that the ruling of the judge was correct for the following reasons.

It has been settled law since the judgment of Denman C.J., in *Goss v. Lord Nugent* (5 B. & Ad. 58), that after an agreement has been reduced to writing it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the previous agreement, or in any manner to add to, or subtract from, or vary or qualify the terms of it, and thus to make a new contract which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will thus be left of the written agreement. The defendant by his pleas set up a new agreement under which additional repairs beyond those specified in the original contract were to be executed by him, and which to the knowledge of both parties made it impossible that the whole of the repairs should be completed within the time fixed by the original contract. To this new agreement the law attached the condition that the whole of the repairs should be executed within a reasonable time. The new agreement, as alleged by the defendant, was substituted for the original contract, and was partly written and partly verbal. The written part of the new agreement consisted of so much of the original contract as was not abrogated or annulled by the verbal portion of the new agreement. In the original contract there was a stipulation that the repairs which were the subject-matter of that contract should be executed within a period of forty-eight days. There was also a stipulation that if the defendant did not complete those repairs within the time fixed for their execution, he should pay to the plaintiff a penalty

of £5 per day for every day they remained unfinished after the expiration of that period. But it was not necessary to fix a time for the performance of the original contract in order to give the plaintiff a right of action for damages if the performance of it was delayed beyond a necessary and reasonable time. Nor was it necessary that the contingent damage to be sustained by the plaintiff from the failure of the defendant to execute the repairs within the stipulated time should be assessed in anticipation in order to enable the plaintiff to claim compensation for delay in performance. Without either of those stipulations the plaintiff would have had an enforceable claim for damages under the original contract if he sustained any loss by the default of the defendant to complete the repairs within a reasonable period. But if both stipulations had been absent from the original contract, and the plaintiff had suffered loss by reason of any culpable delay on the part of the defendant, a jury would have been required for the double purpose of fixing the time within which the repairs ought to have been properly and reasonably completed, and the amount of compensation payable to the plaintiff by the defendant for his delay in executing them. The parties, however, chose to insert both stipulations in the original contract, and if the Court should hold that the penalty of £5 per day was payable as liquidated damages, then the task of the jury would be limited to ascertaining the number of days over which the delay in performance had extended, and calculating the sum that would be produced by multiplying the daily penalty by the number of days for which it was payable. But it was equally competent for the parties to have inserted either of the stipulations without the other of them, and to have left either the question of the damage sustained by the plaintiff or the proper time within which the repairs should have been executed to be determined by a jury. By the new contract, as it was alleged in the defendant's pleas, the stipulation in the original contract that the repairs therein mentioned should be completed within forty-eight days was annulled, and a condition that the whole of the repairs comprised in the new contract should be completed within a reasonable time was substituted for it by implication of law. The defendant also pleaded that after the making of the original contract, and before any breach of it, the plaintiff exonerated and discharged the defendant from his agreement to pay a daily penalty for delay in performance. But no evidence was given of any express waiver or annulment of the stipulation to pay penalties. Therefore if the defendant had been exonerated and discharged from that stipulation as he alleged, he must have been relieved of his obligation by operation of law upon

the making of the new contract. But if the original contract had not contained any stipulation for the performance of it within a fixed period, but had provided that any damage sustained by the plaintiff in consequence of unnecessary delay by the defendant in the execution of the work to be done under it should be assessed at £5 per day, could it have successfully contended that the subsequent agreement of the parties to enlarge the subject-matter of the contract operated as an annulment of that provision?

In such cases as *Holme v. Guppy* and *Hamilton v. Moore*, in which a definite time has been fixed for the performance of the contract and the contingent damages to the employer from any culpable delay by the contractor have been assessed in anticipation, and the contractor has been delayed or obstructed in the performance of the contract by the default or wrongful conduct of the employer, the contractor is relieved of his obligation to perform the work within the stipulated time, and is also relieved from the stipulation which assesses in anticipation the contingent damages to be sustained by the employer from the contractor's delay in performance, because the stipulation which anticipatorily assesses such damages must be construed in reference to an obligation voluntarily accepted by the contractor, either by express agreement or by implication of law. But the only obligation which the contractor in such a case has either expressly or impliedly accepted, and to which the stipulation assessing damages could extend, is the obligation to perform the work within a fixed period, from which he has been discharged by the default or wrongful act of the employer. If he enters upon the execution of the work or continues the performance of it after he has been relieved of the obligations to complete it within the specified time by the default or wrongful conduct of the employer, he is held to undertake to complete the work in a reasonable time. But at the time he is assumed in law to undertake that obligation, the stipulation assessing damages for delay in performance is non-existent, because it referred expressly and only to the other stipulation for completion within a specified period from which the contractor had been previously discharged. The liability to pay damages under a contract must always depend upon a previous obligation upon the breach of which the liability arises; and, if the only obligation in reference to which the liability is accepted is annulled and another obligation is not simultaneously substituted for it, either by the express agreement of the parties or by implication of law, the possibility of liability ceases. But in the case of a new contract made by the alterations or enlargement of an existent contract, before any breach of it has been committed by either party, the abrogation of a stipulation in the original contract

that the work should be completed within a fixed time is simultaneously accompanied by the creation of whatever other obligation is substituted for it, either by the express agreement of the parties or by implication of law, in regard to the time within which the new contract is to be performed; and if another fixed period is not expressly agreed upon by the parties, the law attaches the obligation that the contract shall be executed with due dispatch and completed within a reasonable time. In all such cases the parties may be fairly presumed to have included in the new contract everything contained in the original contract which has not been expressly or by necessary implication annulled by the additional terms of the new contract. Then upon what grounds can it be logically contended that the parties in such a case intended that the stipulation anticipatorily assessing the contingent damages to the employer from culpable delay in performance by the contractor should be annulled? It cannot be assumed that such a stipulation will necessarily be regarded by the employer on the one hand as of less importance to him in relation to the new contract than it was in relation to the original contract, or by the contractor on the other hand, as more detrimental to him in relation to the new contract than it was in relation to the original contract. If the damages were fixed at a manifestly low rate, the stipulation would be more advantageous to the contractor than an indefinite liability to pay whatever damages might be actually sustained by the employer from a protracted delay in performance. The obligation of the contractor to perform the new contract within a reasonable period is as unquestionable and as enduring as was his obligation under the original contract to perform within a fixed period; and there is not any rule of law which precludes the parties in such a case from assessing in anticipation the damages to be sustained by the employer from a breach of that obligation by the contractor. The case of *Legge v. Harlock* is an authority directly contradictory of any proposition which alleges existence of any such rule; and in all the other cases to which I have directed attention, and in which the provision for payment of penalties, in the event of delay in performance, has been held to have been waived or annulled, the contractor has been discharged from his obligation to complete within the stipulated time by the conduct of the employer, in accordance with the well-established maxim that the performance of a condition is excused by any default of the obligee which prevents or delays its fulfilment. Those cases therefore belong to a class which is clearly distinguishable from the cases in which the parties, before any breach of the original contract, mutually agree to substitute for it a new contract which varies and adds to the

terms and conditions of the original contract. In all such new contracts the parties are perfectly free to include an enlarged period for performance in express terms, and if another fixed period is substituted for the period named in the original contract, it would seem impossible to contend that it had no reference to the stipulation for the payment of penalties for delay; but in the absence of an express inclusion of an enlarged period for performance in the new contract, the parties are assumed to enter into it with a full knowledge that a condition to perform within a reasonable time is inserted by implication of law, and that a breach of that condition will confer a right of action for damages. They have previously agreed to assess such damages in anticipation in regard to the period fixed by the original contract for performance. Upon what legal or logical principle can they be held to have not had any desire or intention to assess such damages under the new contract?

A. INGLIS CLARK

(Justice of the Supreme Court, Tasmania).

THE NEAR FUTURE OF LAW REFORM.

I. THE MASTER-MACHINE.

TWENTY-FIVE years have passed since the Judicature Act of 1873 came into operation, but measured by the expansion of ideas that legal Revolution—for it was nothing else—is at least a century behind us. The Act was of course a compromise. No scheme of such magnitude, affecting so many interests and, in some matters, arousing party feeling, could be carried through Parliament in its entirety. Some therefore of its most valuable provisions had to be 'jettisoned' to save the rest.

Judging from the discussions which have taken place during the last ten or fifteen years in the *Times*, and in the legal and other journals on the subject of Law Reform and matters germane to it, it would seem that the time is ripe, or fast ripening, for another move forward—a movement which, for many years to come, shall place the administration of the Law on a businesslike footing which shall commend itself to the lawyers and laity of the twentieth century. The public, in short, expect and are justified in expecting in the near future a generous, enlightened, adequate scheme of Law Reform, and this must include not only a 'Judicature Act' which shall consolidate, amend, and supplement its dozen predecessors, but the establishment of a suitable, permanent machinery, by means of which the Law and its administration may be constantly overlooked, put in good working order, and so maintained.

This would involve two Government measures, the first of which should be the creation of a 'Department,' or Ministry of Justice; for it is time to give to the Law the advantages already given to Agriculture, and about to be extended to Education. This Master-machine being provided would produce, in due course, its first great fruit, the Judicature Bill of 19—, and the Act would follow.

All the great Departments of the State are provided with a more or less efficient organization, by means of which the duties entrusted to them are carried out. The details of this organization differ in different offices, but in all cases the main features are the same, namely, a political chief; a permanent head; a 'Board' or Council of experts, to which the political chief can look with confidence

for advice upon all official matters; and a parliamentary secretary, 'for nothing is more helpless than a Department which has no official defender'; and a sufficient clerical staff. By such an arrangement the political chief is freed from the troublesome minor details of the Office, and is enabled to give the whole of his energy and attention to the policy of his Department. The country has always recognized the necessity and usefulness of such equipments, and has provided a liberal purse for their support; for instance, Admiralty gets its £261,000, Agriculture its £105,000, Local Government its £197,000, and so on.

Let us consider the provision made for the supervision of the administration of Justice in England.

The Lord Chancellor of the day is the political head of the Law. Every matter, even the most trivial, which in any way affects either the administration of the Law or its substance, must pass through his hands and is subject to his control. Upon the shoulders of this one official rests the entire responsibility for everything connected with the Law and its chief officers. Those who can form an adequate idea of the vastness of the region to which this responsibility extends, will understand what the practical outcome of such an arrangement must inevitably be. A task which would tax to the utmost the energies of the most strenuous and robust of men, even if assisted by a Council and an ample staff, is imposed upon one individual. But the supervision of the Law and its officers is only a part, and not the largest part, of a Chancellor's duties. He is a Judge of the Final Court of Appeal. He has to peruse and sanction all rules of procedure, not only those of the Supreme Court, but those of the County Courts and those made under innumerable statutes. He is speaker of the House of Lords, and is one of the chief expounders and defenders of the ministerial policy. He is the patron of many livings, and practically all the Judges, County Court Judges, and Justices of the Peace, are appointed by him. For the discharge of these manifold duties the minister is provided with a permanent secretary, two private secretaries, and certain ceremonial officers at a cost of about £3,000 a year! It is obvious that no official can hope with such assistance as this to discharge these multifarious and most important duties, either to his own satisfaction, or to the public benefit. If he should be so ill-advised as to attempt the impossible, the result would be, to the individual loss of health, or life, and to the country, much valuable service. The intolerable burden of this office is vividly described by the late Lord Herschell in an address to certain Justices of the Peace in the *Times* of November, 1893.

How such a mass of heterogeneous duties, judicial, ministerial,

and legislative, came to be imposed upon one official, is a matter of history, of the history of England. The thing has grown gradually up in earlier and easier times, and in the casual, haphazard, adventitious way so characteristic of our institutions. If the holders of this office have done, as they undoubtedly have, good work and prevented an utter collapse, it is due to the zeal and energy of the chief and his staff, not to the efficiency of the means at their disposal. Few will deny that for the work now, and in the future to be done, the machinery, if it can be so called, now existing is feeble, discredited, and obsolete, and that the time has come for its re-construction upon a far more liberal and enlightened basis.

The analogy of the great Government Offices, and the example of European States, suggest the groundwork of such a re-construction, the outline of which might be somewhat as follows:—

A Ministry, or Department, of Justice. This department would be concerned with civil justice only; the Home Office would, at any rate, until the time shall arrive for a general survey of the whole work of the Government Departments and the adoption of a uniform plan, continue to deal with criminal justice and the police.

A Minister of Justice, the Lord Chancellor.

A Board or Council. This might conveniently consist of two branches, one acting as a 'Consultative Committee,' part as it were of the personal staff of the Chancellor, and consisting of the Permanent Secretary and the Attorney and Solicitor-General. These latter officials might also perhaps undertake the important duties discharged in other offices by the parliamentary secretaries. The other branch of the Council would act as a 'Committee of Advice,' and should be composed of the Presidents and Vice-Presidents of the Council of the Bar, of the Incorporated Law Societies of London and some other principal towns, and of the principal Chambers of Commerce.

The functions of this 'committee of advice' would be to inform the mind of the Chancellor upon matters submitted to it through the Permanent Secretary, and further to bring before the Chancellor everything connected with the administration of justice which it might consider a fit subject for his consideration. The services which such a committee could render to their chief would be of the utmost value. It would act as an 'Intelligence Department,' keeping the office in full touch with the country. Not only would the members of it be themselves men of great skill and experience in matters connected with their professions, but they would have always at their disposal, when they should think it desirable to ask for it, the wealth of expert knowledge possessed by the societies over which they presided.

It is difficult to imagine a more effective instrument for discovering and remedying defects in the law and its administration than this; for the State would practically obtain, at a trifling cost, the assistance of three admirably organized societies, all ready for action, and adequately representing the views of the legal and business communities. It would, probably, be rarely necessary that this 'committee of advice' should meet, as the bulk of their business could be settled by correspondence.

It would be, no doubt, necessary to increase the secretarial and clerical staff, for the purpose of assisting the Permanent Secretary in the routine work of the department, which would be largely increased, and the Chancellor should have the power, with the consent of the Treasury, of providing and paying such persons as might be required for carrying out legal work sanctioned by the department, and who could not be conveniently recompensed by the exercise of the official patronage.

Suppose then that a 'master-machine' has been created, either in the way indicated or in some other—for details matter little if the great object of giving strength and energy to the driving-wheel is accomplished. Its first work would, we have supposed, be the preparation of the Bill on which the Judicature Act of the new century is to be founded. The department would have in its own hands everything, or nearly everything, necessary for that purpose. It would be able, as has been shown, to command the assistance not only of the entire legal profession, but of the ablest men of business outside it. If perchance there should be any especial subject upon which it required assistance, it could readily get it through a Parliamentary Committee. But there is not, in fact, any question connected with the law and its administration which the expert assistance, at the disposal of a department so constituted, could not readily deal with. The Bill, it must be remembered, would deal with the administration of civil justice only, and every point upon this subject is known and has been discussed a thousand times, and there is really nothing upon which an accumulation of Blue-books could throw any useful light.

The first work of the Council being put in hand, the 'committee of advice' might be trusted to set speedily to work on other pressing business. There is an ample supply of professional talent waiting for employment, and there is an inexhaustible amount of material upon which it can be most usefully employed. Under the new conditions these would be brought together, and we might expect that each year would see many consolidating statutes drafted, and a nearer approach made to the inevitable code, and many other schemes carried out which have long lain dormant.

Thus the early years of the century would see the beginnings of a thorough, trenchant, far-reaching system of law reform, not transitory but permanent.

Let us try and imagine how this 'department' would deal with any difficult question which it had to face, such for instance as the holding of assizes and sessions. The Permanent Secretary, at the request of the Chancellor, would send to the 'committee of advice' a series of questions, requesting it to report thereon. The committee would, in a case of such difficulty, call meetings of their respective societies, and debates would ensue. In the result this committee would make a joint report to the Chancellor, who would consider it, with the aid of the persons whom for distinction's sake we have called the 'consultative committee,' and certain conclusions would be come to. Then these conclusions might be again considered by the entire Council, and finally might be submitted to the Judges. The scheme when finally settled would be drafted under the supervision of the Attorney and Solicitor and brought before Parliament.

The action of Parliament is uncertain, but it is likely that a measure so prepared, and backed by such an overwhelming weight of expert authority, would pass without serious opposition. Such a method of proceeding would be (*pace* Mr. Montague Crackanthorpe) cheaper, speedier, and at least as effective as a Royal, or any other, Commission.

There is the question of 'Patronage,' the most onerous of all the burdens which a Lord Chancellor is called upon to bear. Its exercise may seem to possess some few advantages, but the drawbacks are far more numerous and weighty. The ceaseless importunity of a crowd of political, social, and professional acquaintances, not always scrupulous or delicate in the means which they employ, must cause disgust and irritation. For one person gratified and grateful, a hundred often are disappointed and filled with resentment. The position is an intolerable one, and the system faulty. It exposes men to influences which operate most powerfully on those who are the most genial and kindly-natured, and if they yield to the most amiable of human weaknesses, they are denounced. Many have desired to be relieved from their thankless task, and herein the Council proposed might be made of service. Thus when any vacancy occurred the 'committee of advice' would furnish their chief with a list containing a certain number of names, and from these his choice would be made. Probably in such cases the Committee would consult the Council of the Bar, or the Incorporated Law Society, or both, as the circumstances might suggest. The Chancellor would in this way be relieved from unseemly

pressure, whilst the privileges of his office would be substantially untouched. Such an attempt, however, to relieve the Chancellor at the expense of the Government is not likely to be attempted in the near future.

The cost of such a department would not be worth consideration, even if it were likely to be considerable. But this would not be the case. Even if the members of the 'committee of advice' required any remuneration, it would probably be limited to such a sum as would secure them and their societies from being out of pocket. The secretarial and clerical staff, &c., would require to be strengthened, and provision made, as before suggested, for work done by legal experts. But beyond this there would be little, and probably £10,000 a year would suffice to commence with. But the question is not one of cost. For necessary work well done the nation does not haggle about cost. If the Government would create and equip a practical businesslike Department of Justice, it would have no difficulty, even in these times, in getting any money that might be required.

THOMAS SNOW.

NEGOTIABILITY AND ESTOPPEL¹.

ALL first-examination students ought to be ruthlessly plucked if they cannot tell what a 'negotiable' instrument is, and whence its peculiar characteristics were derived; for the text-books make it clear enough to them that—

'Bills of exchange and promissory notes . . . are by the law-merchant negotiable in both senses of the word. The person who . . . becomes holder may sue in his own name on the contract, and . . . he has a good title notwithstanding any defect of title in the party . . . from whom he took it².'

The ordinary common law doctrines were thus completely antagonized by the provisions of the law-merchant; for as Mr. Justice Byles says³:—'The object of the law-merchant as to bills and notes . . . is to secure their circulation, therefore honest acquisition confers title. To this despotic, but necessary principle, the ordinary rules of the common law are made to bend.'

Or, as Baron Wilde puts it⁴:—'The law-merchant validates in the interest of commerce a transaction, which the common law would declare void for want of title or authority.'

And if we ask the cause of this divergence between the two laws, Mr. Bigelow supplies the answer⁵:—'It is here that the law-merchant appears in its strongest colours, and in its most striking contrast to the common law. It is *negotiability* that affords the colouring and the contrast.'

So run the text-books; and perfect familiarity enables us to repeat the language not only without criticism, but without a suspicion of the possibility of incorrectness. Are not these things among the very fundamentals of the law? Well, it will do little harm to inquire.

¹ This article, together with former articles by the same writer in the *LAW QUARTERLY REVIEW* on 'Priorities in relation to Estoppel' (L. Q. R. xiii. 46, 144) and 'Estoppel by Negligence' (L. Q. R. xv. 384), is adapted from part of a forthcoming work on 'Estoppel by Misrepresentation.'

² Per Blackburn J. in *Crouch v. Crédit Foncier*, 1873, L. R. 8 Q. B. 374, 382; 42 L. J. Q. B. 183. Quoted approvingly in Pollock on Contracts, 6th ed., p. 219; Chalmers on Bills, 5th ed., 103; McLaren on Bills, 197, 445; Cababé on Estoppel, 130; Addison on Contracts, 9th ed., 1096. And see Bouvier's Law Dict. (Rawle), tit. Negotiate. To same effect, per Bowen L.J. in *Simmons v. London Joint Stock Bank* [1891] 2 Ch. at p. 294; 60 L. J. Ch. 324.

³ *Swan v. N. B. A.*, 1863, 2 H. & C. 185; 32 L. J. Ex. 273.

⁴ *Swan v. N. B. A.*, 1862, 7 H. & N. 634; 31 L. J. Ex. 436.

⁵ On Bills and Notes, 206.

I. *Transferee suing in his own name.*—The first of these distinguishing characteristics of bills and notes—that a transferee can sue in his own name¹—is very easily displaced, and that in four different ways:—

(1) Assignees of covenants ‘running with the land’ could, and can, sue upon them in their own name². This was not because of any law-merchant or law-farmer, but because the covenant was made with the person who for the time being had the land. That is to say, the covenant was ambulatory.

(2) It was for the same reason, and not because the law-merchant so declared (an absurd idea) that the transferee of a note could sue upon it in his own name:—

‘The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note *bond fide*, not by virtue of any assignment of the promise, but by an original and direct promise moving from the maker to the bearer³.’

(3) All choses in action may be sued upon in equity in the name of the transferees of them. The characteristic in hand, therefore, is that of the courts of law, rather than that of certain choses in action; and that which has been spoken of as a distinguishing characteristic of bills and notes is really but a point of practice, upon which different courts take opposite views⁴.

(4) Whatever may be thought of these three points, it will not be doubted that in many jurisdictions modern statutes have abolished all distinctions between ‘negotiable’ instruments and other choses in action (arising out of contract), with reference to the right of assignees to sue upon them in their own names. All transferees may now so sue.

As to this first characteristic, then, we may say either that it never existed, or that if it did, it has been abolished.

¹ In a noteworthy judgment in *Shaw v. Railroad* (1879, 101 U. S. 557) Strong J. contends that ‘the capability of being thus transferred, so as to give to the indorsee a right to sue on the contract in his own name, is what constitutes negotiability.’ The acquisition of a better title than that of the transferor he treats as a consequence of this capability.

² *Onward Building Society v. Smithson* [1893] 1 Ch. 6, 7; 62 L. J. Ch. 138; *Mitchell v. Warner*, 1825, 5 Conn. 498; *Tapscott v. Williams*, 1841, 10 Ohio 443; *Spencer’s Case* and notes, 1 Sm. L. C. 8th ed. 106 ff.

³ Per Story J. in *Bullard v. Bell*, 1817, Mason 243. And see *Reed v. Ingraham*, 1799, 3 Dall. 505 (Pa.); and *Thompson v. Perrine*, 1882, 106 U. S. 593.

⁴ That the point was one of practice becomes very clear when it is remembered that although an assignee of a chose in action was not permitted to sue at law in his own name, yet his real presence was acknowledged when suing in the name of his assignor. To a defence valid as against his assignor, it was sometimes a good replication that the plaintiff was suing as a trustee for the assignee, who was therefore the real plaintiff. In other words, courts of law allowed transferees to assert their rights through their trustees, whereas equity permitted the same thing to be done directly. See *Master v. Miller*, 1791, 4 T. R. 340, judgment of Buller J. *passim*.

II. *Honest acquisition confers title.*—It is very extraordinary that it should ever have been said that a distinguishing characteristic of 'negotiable' instruments was that honest acquisition of them confers title. Consider these points:—

(1) A 'negotiable' instrument is a 'negotiable' instrument whether it is due or overdue; and yet honest acquisition of it at one stage of its career will (generally) confer title, but when it passes a certain age an honest transferee takes what is given him and no more¹.

(2) Again, it is not true even of current instruments that honest acquisition will always confer title; for it will be of no assistance if the signatures to them have been obtained by certain frauds²; or if the amount payable has been fraudulently increased³; or if the signature to a blank piece of paper has been stolen, and converted into a bill⁴; or if even a completed, but unissued, bill be stolen⁵; or if a material alteration has been made in a bill⁶; or in many other cases⁷.

(3) Nor can it be said that the 'honest acquisition' doctrine is confined to 'negotiable' instruments, for there is the ever-widening class of cases provided for by that most important rule:—

'Generally speaking, a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield, when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and unaffected by, such equities⁸.'

¹ 'Where an overdue bill is negotiated, it can be negotiated only subject to any defect of title affecting it at its maturity': 45 & 46 Vict. (Imp.) c. 61, s. 36 (2); 53 Vict. (Can.) c. 33, s. 36 (2).

² *Foster v. McKinnon*, 1869, L. R. 4 C. P. 704; 38 L. J. C. P. 310; *Second Nat. Bank v. Hewitt*, 1896, 59 N. J. L. 57; 34 Atl. Rep. 988.

³ *Schofield v. Londesborough* [1894] 2 Q. B. 660; 63 L. J. Q. B. 649; [1895] 1 Q. B. 536; 64 L. J. Q. B. 293; [1896] A. C. 514; 65 L. J. Q. B. 593.

⁴ *Byles on Bills*, 15th ed., 255; *Daniel on Negotiable Instruments*, s. 814; *Parsons, N. & B.* vol. 1, 114.

⁵ *Bazendale v. Bennett*, 1878, 3 Q. B. Div. 525; 47 L. J. C. P. 624; *Bigelow on Bills and Notes*, 177, 178, and cases there cited. But see per *Williams J.* in *Ingham v. Primrose*, 1859, 7 C. B. N. S. 82; 28 L. J. C. P. 294.

⁶ *Calvert v. Baker*, 1838, 4 M. & W. 417; *Desbrow v. Wetherly*, 1824, 1 Moo. & R. 438; *Crotty v. Hodges*, 1842, 5 So. N. R. 221; 4 M. & G. 561; 11 L. J. C. P. 289; *Burchfield v. Moore*, 1854, 23 L. J. Q. B. 261. See the codes, 45 & 46 Vict. (Imp.) c. 61, s. 64; 53 Vict. (Can.) c. 33, s. 63. *Middaugh v. Elliott*, 1 Mo. App. 462; *Kingston Sav. Bk. v. Bosserman*, 1893, 52 Mo. App. 269; *Newman v. King*, 1896, 54 Ohio St. 273; 43 N. E. Rep. 683. But see *Mt. Morris Bk. v. Lawson*, 1894, 27 N. Y. Sup. 272.

⁷ *Master v. Hill*, 1793, 4 T. R. 320; 5 T. R. 367; 2 Hy. Bl. 140; 2 R. R. 399; *Mason v. Bradley*, 1843, 11 M. & W. 593; 12 L. J. Ex. 425; *Harrison v. Colgreave*, 1847, 4 C. B. 562; 16 L. J. C. P. 198; *Warrington v. Early*, 1853, 2 E. & B. 763; 23 L. J. Q. B. 47; *Gardner v. Walsh*, 1855, 5 E. & B. 91; 24 L. J. Q. B. 285; *Hirschfield v. Smith*, 1866, L. R. 1 C. P. 340; 35 L. J. C. P. 177; *Hirschman v. Budd*, 1873, L. R. 8 Ex. 171; 42 L. J. Ex. 113; *Vance v. Louther*, 1876, 1 Ex. D. 176; 45 L. J. Q. B. 200; *Hosler v. Beard*, 1896, 54 Ohio St. 398; 43 N. E. Rep. 1040; *Columbia v. Cornell*, 1888, 130 U. S. 658; *Swinney v. Edwards*, 1898, 55 P. Rep. 306 (Wyo.).

⁸ *Re Agra and Masterman's Bank*, 1867, L. R. 2 Ch. at p. 397.

(4) The cases are legion, too, in which honest acquisition of such 'non-negotiable' articles as goods and lands will confer a better title than that held by the transferor:—

(a) A mortgagee allows the mortgagor to have the deeds, and they are fraudulently deposited as security for a loan. The deposittee gets a better title than the depositor had¹.

(b) Goods entrusted to a mercantile agent may be sold, and a good title passed, although he had no interest in the goods, and no right to sell them².

(c) Any one held out as the owner of goods may transfer a better title than he has—at least the owner will be estopped from asserting to the contrary³.

(d) A purchaser in market overt may obtain a better title than that of his vendor.

Negotiability and transferability.—Abandoning then these two customary significations of 'negotiability,' let us try the dictionary meaning, namely, 'transferability.' This has been adopted by some writers, but only very summarily to be departed from. For example, in 'Daniel on Negotiable Instruments,' we find it stated that "—'An instrument is called negotiable when the legal title to the instrument itself, and to the whole amount of money expressed upon its face, may be transferred from one to another by indorsement and delivery by the holder, or by delivery only.'

But the learned author approves of such language as the following:—

'Written contracts are not necessarily negotiable, simply because by their terms they inure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word 'bearer' had been omitted, but they were *not negotiable* instruments in the sense supposed by the appellants. *Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owners*'⁴.

Here then are documents which are transferable, but *not* negotiable. In another paragraph, referring to bills of lading, the same writer says⁵:—

'Bills of lading are generally classed among negotiable instruments and are frequently spoken of as negotiable like bills of exchange, by text-writers and by jurists of high reputation and

¹ *Perry-Herrick v. Athwood*, 1857, 2 De G. & J. 21; 27 L. J. Ch. 121; *Brocklesby v. Temperance Building Society* [1895] A. C. 173; 64 L. J. Ch. 433.

² The Factors Act, 52 & 53 Vict. (Imp.) c. 45, ss. 2, 7, 8, 9, 10.

³ *Ib.* 2, 7, 8, 9; Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, s. 21.

⁴ S. 1. See also Smith's L. C., 10th ed., 456; and Addison on Contracts, 10th ed., 1096.

⁵ *Railroad Co. v. Howard*, 7 Wall. 415. Quoted by Mr. Daniel.

⁶ S. 1727.

authority¹. But while *they are assignable* and possess certain capacities of negotiation, which assimilate them quite closely in some respects to negotiable instruments, *they are not negotiable* in the same sense as bills of exchange or negotiable promissory notes². And it is more correct to speak of them as *quasi negotiable instruments*, since they are rather like, than of, them³.

It would of course be quite out of the question to substitute for 'quasi negotiable' the phrase *quasi transferable*. That would be to alter Mr. Daniel's meaning, which was that although bills of lading were capable of *complete* transfer, yet that they lacked some of 'the peculiarities which attach to negotiable paper'—in other words, they are completely transferable, but only *quasi* negotiable.

Not much help is to be obtained from the codes. We find in the English and Canadian compilations that 'A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill⁴.' But if we were to say that a blacksmith's account 'is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the account,' the assertion would be quite as valid, and just as fruitless. For the gist of both statements is merely that bills and accounts may both alike be transferred—a remark that, of course, does not help one to appreciate any distinction between them.

The last hope of intelligibility (upon the view that negotiability means simply transferability) seems to be removed with Mr. Joseph Chitty's perfectly accurate remark⁵ that 'It is now well established that it is not essential to the validity of a bill that it should be transferable from one person to another⁶.'

¹ *Lickbarrow v. Mason*, 1787, 2 T. R. 63, 1 R. R. 425, in which the jury found 'that by the custom of merchants bills of lading . . . to order or assigns, have been and are . . . negotiable and transferable'; *Berking v. Walling*, 7 Ad. & E. 22; *Bell v. Moss*, 5 Whart. 189.

² *Gurney v. Behrend*, 3 E. & B. 622; 23 L. J. Q. B. 265; *Barnard v. Campbell*, 55 N. Y. 472; 1 Smith's Lead. Cas., 10th ed., 693.

³ *Schouler's Personal Property*, 410, 605; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145.

⁴ 45 & 46 Vict. (Imp.) c. 61, s. 31 (1); 53 Vict. (Can.), c. 33, s. 31. The codes also provide that a bill containing 'words prohibiting transfer . . . is not negotiable' (s. 8); but the codes, of course, do not mean that such a bill cannot be transferred. For as Chalmers says (on Bills, p. 129):—'A bill may be transferred by assignment or sale, subject to the same conditions as would be requisite in the case of an ordinary chose in action. Thus: C is the holder of a note payable to his order. He may transfer his title to D by a separate writing assigning the note to D; *Re Barrington*, 2 Sch. & Lef. 112, 9 R. R. 61 (1804); or by a voluntary deed constituting a declaration of trust in favour of D: *Richardson v. Richardson*, L. R. 3 Eq. 686 (1867); or by a written contract of sale: *Sheldon v. Parker*, 3 Hun. (N. Y.) 498 (1875). A bill is a chattel, therefore it may be sold as a chattel. A bill is a chose in action, therefore it may be assigned as a chose in action.'

⁵ Chitty on Bills, 11th ed., 115.

⁶ For example, days of grace are allowed on a note payable to A without adding

If now we say that bills are negotiable instruments; that negotiable means transferable; and that bills are very often not transferable, we have some notion of the confusion to which current phraseology has reduced us.

Summary.—We seem thus to have ascertained that we cannot ascribe to 'negotiable' instruments the exclusive possession of any of the characteristics by which they are usually said to be distinguished:—

1. Transferees of other choses in action may sue upon them in their own names.

2. Transferees of 'negotiable' instruments sometimes take subject to equities, and transferees of other choses sometimes take free from them. Purchasers of such 'non-negotiable' commodities as goods and lands often acquire better titles than those of their vendors.

3. Blacksmith's accounts are just as 'negotiable' as bills and notes—judged by their transferability.

What then is Negotiability?—The difficulties commence to dissolve as soon as it is observed that the word 'negotiable' is used in two senses. The primary meaning unquestionably is *transferable*; but consider the following sentence: 'A *non-negotiable* promissory note is a mere chose in action; as such, it is *assignable*, and the assignee thereof may maintain an action thereon in his own name¹.'

The language is in perfect harmony with our ideas; but of course it does not mean that a *non-assignable* note is assignable. In like manner, and in language which is customary, Mr. Daniel, treating of 'the *transfer* of certificates of deposit²,' expresses doubts as to whether they are *negotiable*³. Stock-certificates are undoubtedly *transferable*, but Mr. Daniel says that they 'are not regarded as *strictly negotiable*, although they inure to the benefit of the bearer, and may be classed amongst instruments quasi-negotiable⁴.'

The truth is that 'negotiable' has an original and an acquired signification. Originally it meant transferable; but afterwards it

'or to his order or bearer': *Smith v. Kendall*, 1794, 6 T. R. 123. Of a similar note it was said that 'It is not necessary that such a note should be in itself negotiable, it is sufficient that it should be a note for the certain payment of a sum of money whether negotiable or not' (per Le Blanc J. in *Rex v. Box*, 1815, 6 Taunt. 328); and a conviction for forgery of such a document was sustained. And see *Whyte v. Heyman*, 1859, 34 Pa. 143. Now by the Codes (altering the law), 45 & 46 Vict. (Imp.) c. 61, s. 8 (4), 53 Vict. (Can.) c. 33, s. 8 (4), such a note is 'negotiable.'

¹ *Barry v. Wachosky*, 1899, 77 N. W. Rep. 1080.

² On Negotiable Instruments, s. 1702.

³ *Ib.* s. 1703.

⁴ *Ib.* s. 1708. Consider also this sentence from Chalmers on Bills (5th ed.): 'The character and incidents of negotiability depend upon the time of negotiation' (p. 115).

was used to indicate the *effects* of transfer, namely, that the transferee (1) took free from equities, and (2) could sue in his own name. And thus we say that certain choses are transferable, although not negotiable—meaning that they are transferable, but that certain effects do not accompany their transfer¹.

According to primary meaning then a 'negotiable' instrument was a transferable instrument; and in that sense the word truly indicated, at one time, a real distinction among choses in action. The secondary meaning, however—that in which it is taken as indicating the existence of peculiar effects of transfer—was always inaccurate and unscientific; for as to the transferee bringing an action in his own name, that is the normal result of the transferability of a chose in action; and as to honest acquisition conferring title, this secondary meaning arrogates to the transfer of bills and notes alone an effect (1) which existed sometimes in the case of other property, and (2) which sometimes was absent from bills and notes themselves. In other words, 'negotiable' was used (in this secondary sense) to mark off bills and notes from other choses in action, by a peculiarity of which they not only had no exclusive possession, but which frequently they had not themselves. However dubious to some lawyers this assertion may appear to be, there is at least no doubt (1) that at the present day all choses in action arising out of contract are transferable; and (2) that any rule as to transferees of choses in action taking free from equities is by no means confined to bills and notes, but is, as we have seen, 'a rule which must yield when it appears from the nature or terms of the contract, that it must have been intended to be assignable free from and unaffected by such equities².'

We must get away, then, from the terms 'negotiable' and 'non-negotiable.' For (1) their primary and only true meaning has been lost to them; (2) that meaning would now be useful only to distinguish between choses which arise out of contract, and those which do not (for the former are by statute assignable—negotiable—and the others are not), and the word 'transferable' (having no false connotations attached to it) is better for that purpose; and (3) the acquired meaning of the terms was never scientific—at all events at the present time they are inaccurate and misleading.

¹ See the instructive judgment of Strong J. in *Shaw v. The Railroad*, 1879, 101 U. S. 557, in which he says: 'The capability of being thus transferred so as to give to the indorsee a right to sue on the contract in his own name is what constitutes negotiability. . . . In regard to bills and notes *certain other consequences generally though not always follow*.' Ashhurst J., too, as early as 1787, had said: 'The custom of merchants only establishes that such an instrument may be indorsed, but the effect of the indorsement is a matter of law;' *Lickbarrow v. Mason*, 1787, 2 T. R. p. 71.

² Ante, p. 137.

Ambulatory and non-ambulatory.—Nevertheless, as the quotation just made sufficiently shows, there is a real distinction among choses in action (arising out of contract), namely, between those ‘intended to be assignable’ free from equities, and those not so intended—or, as the present writer ventures to suggest, between ambulatory and non-ambulatory contracts. All contracts are now transferable (negotiable); but some are intended to be redeemable to persons other than the immediate promisee; are intended to be passed on from hand to hand; are intended, that is, to be ambulatory.

Of such contracts there were in early times none (the simple preceded the complex), and the courts declined to acknowledge their validity long after the customary rules concerning them were well known to everybody. Foreign bills of exchange formed the thin edge of the wedge; the statute of Anne¹ overruled Chief Justice Holt in his refusal to sanction the admission of promissory notes; in 1758, a bank-note was held to be negotiable²; in 1764, a draft or cheque on a bank³; in 1781, a note indorsed in blank⁴; exchequer bills in 1820⁵; and bonds of the King of Prussia, payable to the holder, in 1824⁶.

All these instruments have a common characteristic (they are intended to be ambulatory), but one that is by no means necessarily confined to them, as we shall see later on. Some members of a class must necessarily be known before the class itself can be accurately described, and non-recognition of the true distinguishing characteristic has often led to unnecessary difficulty. Thus it happened that it remained for Lord Cairns (1862), in perhaps the most noteworthy single sentence of modern law, to indicate the clear and simple ground upon which rested the asserted peculiarities of ‘negotiable’ instruments. It is worth repeating:—

‘Generally speaking a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract; but this is a rule which must yield when it appears from the nature or terms of the contract that it must have been intended to be assignable free from, and unaffected by, such equities⁷.’

In other words, when it was intended that an obligee was not to set up equities, he is not to be permitted to do it. Strange

¹ 3 & 4 Anne, c. 9.

² *Miller v. Race*, 1 Burr. 452.

³ *Peacock v. Rhodes*, Doug. 636.

⁴ *Gorgier v. Miville*, 3 B. & C. 45, 27 R. R. 290.

⁵ *Grant v. Vaughan*, 3 Burr. 1516.

⁶ *Woolley v. Pole*, 4 B. & Ald. 1, 22 R. R. 594.

⁷ Ante, p. 137.

that there should ever have been any difficulty about that proposition, even in getting it stated.

Observe how this sentence and the statutes cut into our notions of 'negotiability.' A 'negotiable' chose in action is one transferable at law, upon which the transferee may sue in his own name. Is it?—Then all contracts arising out of contracts are now 'negotiable.' A 'negotiable' instrument is one that passes to a transferee free from equities. Is it?—Then all contracts 'intended to be assignable free from and unaffected by such equities' are 'negotiable'; and overdue bills and notes are not.

Evidently, then, 'negotiability' is no longer a word with which to conjure up paradoxical conclusions. The 'negotiable instrument' category was originally formed to meet the case of a single sort of document. The essentially distinguishing characteristic of such instrument was not observed. Other documents, therefore, which had that characteristic, but were dissimilar from bills of exchange in other immaterial respects, were denied admission to the category. Nevertheless, upon one ground or another various classes of documents were eventually admitted. Now we see that ambulatory intent was the true distinguishing characteristic, and the category must be rectified accordingly.

Freedom from equities.—There are generally supposed to be two points at which 'negotiability' affects the rights of the holders of bills and notes. The first has regard to equities affecting *liability* upon them; and the second relates to the equities of the real owner of the paper, as against some holder of it who claims title through a finder, a thief, or a fraudulent trustee. These two cases must be treated separately in order to ascertain accurately the true foundation of the law which governs them. The law we know fairly well; what is the rationale of that law?

1. There is a choice of explanations in the first of these problems (why cannot the maker of a note set up his equities as against a bona fide transferee of it?); and neither of them is indebted for its rationality to the law-merchant:—

(a) One of them has already been indicated—the maker of a note is liable upon it to a holder in due course, although he may have equities, because—

'The note is an original promise by the maker to pay any person who shall become the bearer; it is therefore payable to any person who successively holds the note bona fide, not by virtue of any assignment of the promise but by an original, and direct, promise, moving from the maker to the bearer¹.'

¹ Ante, p. 136.

Observe carefully what is here meant. It is not that the transferee does not acquire title to a note 'by virtue of any assignment' of it; but that having so acquired it, the promise that he sues upon is one directly with himself. That is to say, he does not allege that the maker promised the payee that he would pay a third person—that is an endorsee; but that the promise was to the transferee, although at the time of the promise he was an unascertained person. In this view the case would be analogous to promises frequently made by advertisement to pay to the finder of a lost article. In such case the promise is not with the newspaper, but with the person who answers the description contained in the promise. The promise is 'an original and direct promise moving from the' advertiser to the finder.

(b) Perhaps, however, the better view is that of Page Wood L.J., who, in holding a company liable upon its bonds, notwithstanding equities between it and the original holder, said: 'Where there is a distinct promise held out by the company informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own¹.'

In other words, although there may be equities, yet the company is estopped from setting them up. It issued bonds redeemable to bearer; it was aware that the bonds, being ambulatory, would probably be transferred to third parties; it might have placed upon the face of the bonds notice of the equities; it enabled the original holder to deceive innocent purchasers, and it is consequently estopped from setting up its equities. Here we are upon firm ground. No support is required from the law-merchant, nor from 'negotiability.' We are not in antagonism to the general law, but are appealing to it.

2. Having thus accounted for the disappearance of the equities of persons liable upon bills and notes, let us try to ascertain upon what principle it can be held that a thief, a finder, or a fraudulent trustee may pass a better title than that which he himself has.

The usual answer is 'law-merchant' and 'negotiability,' in hopeless antagonism to the general law: 'The law-merchant validates in the interest of commerce a transaction which the common law would declare void for want of title or authority².'

And thus, when the question of title to lost, stolen, or misappropriated bonds came to be decided, and the courts felt that transferees in due course ought to be protected, the Canadian³

¹ *Re General Estates Co.*, 1868, L. R. 3 Ch. 758.

² *Ante*, p. 135.

³ *McKenzie v. Montreal*, 1878, 29 U. C. C. P. 333.

and American¹ judges declared that bonds were 'negotiable.' This was thought to be a sufficiently satisfactory solution of the problem.

In England, a different and a most peculiar course was adopted. Most of the judges were quite unwilling to hold that bonds were 'negotiable,' and yet they were unable to see any other ground upon which they could decide in favour of the transferee. They therefore determined that although bonds were not 'negotiable,' yet that the persons dealing with them were estopped by their form (payable to bearer) from so saying. We shall return to this point.

Mr. Justice Blackburn's criticism of that proposition should have been sufficient² :—

'The company had power to estop itself in that way, but the plaintiff is obliged to contend in this case that they had also power to alter and abandon the right of those who might become holders of the instrument, and to declare that such persons should, contrary to the general rule of law, hold their property on a precarious title, liable to be divested if a thief or finder could find a bona fide purchaser for the debenture.'

To this Lord Cairns made an extraordinary reply, formulating the doctrine of 'negotiability by estoppel'³ :—

'The scrip itself would be a representation, to any one taking it—a representation which the appellant must be taken to have made, or to have been a party to—that if the scrip were taken in good faith and for value, the person taking it would stand, to all intents and purposes, in the place of the previous holder. Let it be assumed for the moment that the instrument was not negotiable; that no right of action was transferred by the delivery; and that no legal claim could be made by the taker, in his own name, against the foreign Government; still the appellant is in the position of a person who has made a *representation* on the face of his scrip, *that it would pass with a good title*, to any one on his taking it in good faith, and for value, and who has put it in the power of his agent to hand over the scrip with this representation to those who are induced to alter their position on the faith of the representation so made. My Lords, I am of opinion that on doctrines well established, of which *Pickard v. Sears* may be taken to be an example, the appellant cannot be allowed to defeat the title which the respondents have thus acquired.'

¹ Daniel on Neg. Insts. a. 1500.

² *Crouch v. Crédit Foncier*, 1873, L. R. 8 Q. B. 386; 42 L. J. Q. B. 183.

³ *Goodwin v. Roberts*, 1876, 1 App. Cas. 476; 45 L. J. Q. B. 748. This view has been widely indorsed: see per Lord Hatherley, 1 App. Cas. 491 sqq.; *Easton v. London Joint Stock Bank*, 1886, 34 Ch. D. 95; 56 L. J. Ch. 569; 13 App. Cas. 333; 57 L. J. Ch. 986; *Simmons v. London Joint Stock Bank* [1891] 1 Ch. 294; 60 L. J. Ch. 313; [1892] A. C. 201; 61 L. J. Ch. 723. The phrase 'negotiability by estoppel' belongs to Bowen L. J.; *Easton v. London Joint Stock Bank*, 1886, 34 Ch. D. at p. 113; 56 L. J. Ch. 569.

The present writer has found it impossible to accept this doctrine. Reduced to simple terms, the proposition is this: A non-negotiable instrument payable to bearer is, in itself, a representation that it is a negotiable instrument, and such representation will estop some one from denying that such is its legal effect. But surely a non-negotiable instrument or any other document cannot, in itself, be a representation that it is anything but what it is. If, connected with the instrument, there were some misrepresentation of its character, that would be another matter. A man may allege that he is a woman, but he can hardly, himself, be such a representation.

Observe, further, that Lord Cairns said that the document was a representation 'that it would pass, with a good title, to any one, on his taking it in good faith, and for value.' But the only feature that can be referred to in support of this is that the instrument was payable to 'bearer,' and that, surely, cannot amount to a representation that according to law a new bearer's title would be any better than that of the old one¹.

Another essential ingredient, too, of estoppel, is entirely absent from the cases, namely, evidence that the purchaser of the bonds was misled by the misrepresentation, and upon the faith of it changed his position. The probabilities are that his opinion was exactly the same as that of the true owner of the documents, and that he acted exclusively upon his own ideas of negotiability.

'Negotiability,' then, whether real or by estoppel, is the reason assigned for holding that the transferor's title may be improved by his assignment; but this explanation is altogether unsatisfactory, for 'negotiability,' as we have seen, itself stands very much in need of explanation. In some cases, for example, evidence has been given that bonds are 'negotiable,' but the judges have not been able to agree (as we may now very well understand) as to the effect of such proof. In one case, *Bowen L.J.*, while admitting that it had been shown that title to the bonds would pass by delivery, yet objected that it did not follow 'that delivery by a person who has no title, confers nevertheless a title on a bona fide holder².'

And although Lord Watson thought that—

'It necessarily follows from the negotiable character of the documents that Delmar who was lawfully in possession of them for a special purpose, was nevertheless in a position to give a valid title to any person acquiring the bonds from him in good faith³.'

¹ See the judgment of the same learned judge in *Re Natal Investment Co.*, 1868, L. R. 3 Ch. at p. 360; 37 L. J. Ch. 362; also *Williams v. Colonial Bank*, 1888, 36 Ch. D. 388; 38 Ch. D. 388; 58 L. J. Ch. 826; see S. C., sub nom. *Colonial Bank v. Cady*, 1890, 15 App. Cas. 267; 60 L. J. Ch. 131.

² *Simmons v. London Joint Stock Bank* [1891] 1 Ch. 294; 60 L. J. Ch. 313.

³ *Ib.* [1892] A. C. 213; 61 L. J. Ch. 723.

yet it is quite clear that the noble Lord was taking out of the word 'negotiable' exactly what he put into it, and that all that could be said was that a thief may pass a good title to a 'negotiable' instrument, if that result be included in the word 'negotiable.'

Estoppel by Ostensible Ownership.—Although without much direct support, the present writer ventures to suggest that the true foundation for the decision of such cases is to be found not in 'estoppel by negotiability,' nor in 'negotiability' of any kind, but in estoppel by ostensible ownership, or ostensible agency.

Let us commence with *nemo dat quod non habet*. That proposition looks as though it ought to be universally true. But it is said that it fails in the case of 'negotiable' instruments, and that a man can give that which he has not got, provided it be a 'negotiable' document. Is the principle a true one? And if so, are 'negotiable' documents the only exceptions to it?

Let us remember that if a thief sells a horse in market overt, he gives a title that he has not got. And if a mortgagor, having been foolishly intrusted by the mortgagee with the title deeds, conveys to an innocent purchaser, he gives that which he has not got¹. In short, the cases are legion in which ostensible owners of property give to bona fide purchasers that which they have not got.

But we are going much too fast, and although with plenty of precedent for it, are using language in much too loose a fashion. Is it true that an ostensible owner of property can convey to a purchaser a better title than he has? Should the true owner of a horse stand by while a pretending owner sells the animal to an innocent purchaser, it would be quite inaccurate to say that the vendor gave a better title than he had. He could not do so. And the language really imports nothing but this, that although the purchaser had acquired no title at all, yet that the true owner is estopped from so saying.

Nemo dat quod non habet is then true—universally true; but its truth in no way prevents an owner of property from being estopped by his conduct from setting up his good title as against a transferee who has none.

This is the point. And it applies as well to 'negotiable' instruments as to all other sorts of property. When so applied it solves all the difficulties which, being thought to be insolvable, have been referred to the inscrutable play of the law-merchant operating in antagonism to the common law.

Remembering then that ostensible ownership may often estop

¹ *Perry-Herrick v. Atwood*, 1857, 2 De G. & J. 21; 27 L. J. Ch. 121; *Brocklesby v. Temperance Building Society* [1895] A. C. 173; 64 L. J. Ch. 433.

a true owner (of all sorts of property) from setting up his title as against an innocent purchaser, attention must be directed to the fact that the appearance of ownership takes its colour sometimes from the character of the property in question, sometimes from the nature of the usual employment of the ostensible owner, and sometimes from the customs of the place in which the transaction takes place¹. Observe next the distinction between the appearance of ownership (1) of goods, and (2) of ambulatory instruments. Possession of goods is (usually) no indication of ownership of them, and therefore no one is misled by possession; but—

‘Every holder of the bill takes the property, and his title is stamped on the bills themselves. The property and possession are inseparable. This was necessary to render them negotiable; and in this respect they differ essentially from goods of which the property and possession may be in different persons².’

A holder of a bill, then, *appears* to be the owner of it, while there is usually no such appearance in the case of goods. Now the law of estoppel by ostensible ownership of goods is well known, and may shortly be stated to be that if an owner permit another to appear to be the owner, he will be estopped as against persons dealing with that other. And the rule includes, of course, ambulatory instruments; the only distinction between them and goods being as to the circumstances which constitute appearance of ownership. In the case of ambulatory documents, mere possession of them is enough³; while as to goods there must be something more. But in both cases alike, the true owner must avoid the appearance of ownership in another. And, therefore, the owner of an ambulatory instrument must, if he wish to be safe, keep it in his own possession.

Estoppel by Ostensible Agency.—Sometimes the validity of a transferee's title must be attributed to ostensible agency rather than to ostensible ownership. In the case of goods, for example, the owner may be estopped by a person alleging his agency to sell, although none, in fact, existed—if the owner has permitted the appearance of agency. The usual case of a sale by a factor in defiance of his instructions is a sufficient illustration of the point. In the same

¹ See cap. 26.

² *Collins v. Martin*, 1797, 1 Bos. & P. 651, 4 R. R. 752. And see per Lord Mansfield in *Peacock v. Rhodes*, 1781, Doug. 636; *Murray v. Lardner*, 1864, 2 Wall. 110; *Martin v. Martin*, 1898, 51 N. E. Rep. 691; Cent. Dig. vii. 2551, 2, 8. The language quoted in the text is inaccurate. Property and possession of bills, as of aught else, are separable; otherwise I could never bring trover for bills against my bookkeeper. What is meant is that possession and appearance of property are inseparable. Even that is not universally, but only commonly true. Circumstances may sometimes indicate agency and not title.

³ Possession of an equitable assignment of money is ostensible ownership of the fund: *State v. Hastings*, 1862, 15 Wis. 83.

way, a bill-broker having bills in his possession may be understood to be an agent merely, and a transferee of the bills would therefore be unable to plead that the broker was the ostensible owner of them. Ostensible agency to deal with the bills would answer the same purpose.

Lost or Stolen.—It may be suggested that this explanation is insufficient in the case of lost or stolen documents. No doubt, it may be said, if an owner of bills or of goods permit the appearance of ownership or agency in another person he ought to be estopped as against an innocent purchaser; but how can that apply to cases in which the true owner gives no such permission, to cases in which, indeed, he may be actively endeavouring to neutralize false appearances?

Much analogy to the law of estoppel is to be found in the department of torts, which declares for liability in case of wilful injury; but it also imposes damages where the injury was the result of carelessness. And so also in the law of estoppel, if through the carelessness of the true owner of property, another person is enabled to pose as its owner, he may be estopped to the same extent as if the deception were his own design.

An owner of ambulatory instruments is aware that possession of them is evidence of their ownership. It behoves him, therefore, to exercise 'consummate caution' with regard to them, and if they escape him, he and not an innocent purchaser ought to suffer. This law is not more unreasonable than that which provides that 'more than ordinary care, nay, "consummate caution"¹, is required of persons dealing with dangerous weapons², and is supported by the dictum of Lord Coleridge: 'A man may be more careless with regard to the custody of a thing that can be made available only by means of forgery than if by mere larceny³'—more careless, for example, of a wardrobe, than of money or company bonds.

Owners of ambulatory instruments have two courses open to them. They may, by appropriate indorsement, restrict the transferability of their documents; or they may leave them payable to bearer. If they adopt the first alternative they are safe from loss and theft. But if, for their own purposes, they prefer that the instruments should remain payable to bearer, they must provide sufficiently against escape in order that innocent purchasers may not be swindled. This doctrine found acceptance as early as 1764:—

'Though both the claimants are innocent; yet as Bicknell lost the note and Grant took it in the course of trade bona fide, and

¹ Per Earle C. J. in *Potter v. Faulkner*, 1861, 1 B. & S. 805. And see *Dixon v. Bell*, 1816, 5 M. & S. 198, 17 R. R. 308.

² Pollock on Torts, 5th ed., pp. 46, 455.

³ *Arnold v. Cheque Bank*, 1876, 1 C. P. D. 581; 45 L. J. C. P. 562.

upon a valuable consideration Grant has the better equity. But if their equity were only equal, it is a known and a good rule, that *Melior est conditio possidentis*; and that would be sufficient to turn the scale if there was negligence on one side, and none on the other, that also would turn the scale: and if there be any on either side in this case it should seem to have been rather *imputable to the person who lost it* than to him who thus took it in the course of trade¹.

And in 1820, Mr. Justice Best, in dealing with misappropriated exchequer bills, which the owner had kept in blank instead of rendering them useless to others by filling in his own name, said:—

‘It is the plaintiff’s own negligence in not filling up the blank that has rendered it impossible for the defendants to ascertain that he had any right to it; and it would therefore be inconsistent with the law of justice², that under such circumstances he should be allowed to call on them to make good the loss that has arisen from the fraud of his agent³.’

Market overt.—It is noteworthy that the application of the law of estoppel above suggested, or something very nearly akin to it, was the foundation for holding that a purchaser from a thief in market overt was to be protected from the true owner. Cockburn C.J., in *Crane v. London*⁴, said:—

‘Look to the origin of the law as to such sales. It arose at the time when there was much greater simplicity of practice between buyer and seller. The practice then was to buy in markets at fairs. Shops were very few in London, and persons whose goods were taken feloniously would know to what place to resort in order to find them. I can therefore quite understand that the law in question was established for the protection of buyers, that, if a man did not pursue his goods to market where such goods were openly sold, he ought not to interfere with the right of the honest and bona fide purchaser.’

Observe the close analogy here presented to estoppel as applied to bills and notes. As we have seen, ‘title is stamped on the bills themselves’; the holder may, therefore, properly be presumed to be the owner; the real owner might have kept them ‘in his pocket,’ but, if he permitted others to have them, the representation of ownership which they carried with them would estop him from asserting his title. So it is in the case of sales in market overt. Their possession indicates ownership; and if a man does not

¹ Per Wilmut J. in *Grant v. Vaughan*, 3 Burr. 1526. See the same reasoning applied to vouchers in *Cowdry v. Vanderburgh*, 1879, 101 U. S. 572; to bills of lading in *Lickbarrow v. Mason*, 1787, 2 T. R. p. 71; and to stock certificate with blank but signed transfer and power of attorney in *National v. Gray*, 1898, 12 App. D. C. 276, *Contra, Scotland v. Rollins*, 1899, 53 N. E. Rep. 863 (Mass.).

² More specifically, *estoppel*.

³ *Wooley v. Pole*, 1820, 4 B. & Ald. 1.

⁴ 1864, 5 B. & S. 318; 33 L. J. Q. B. 224.

'pursue his goods to market,' but allows the representation of ownership in others to be made, 'he ought not to interfere;' he is estopped.

Loss of Seal.—Further support for the views advanced may be gathered from the olden times, when every man of property had his own distinctive seal, with which, rather than with his signature, he executed his obligations. In those days a finder, a thief, or a fraudulent custodian of the seal, might bind the owner, in favour of innocent persons, upon the ground that '*he (the owner) should have taken better care of it.*' Sufficient of the learning upon this subject for present purposes is contained in the following extract from a judgment of Wills J.¹

'In Glanvil, book 10, ch. 12, it is said that the man who entrusts his steward with his seal will be bound by it, if the steward seals a deed with it, *for he should have taken better care of it.* Bracton (edition published by the Record Commissioners, and edited by Sir Travers Twiss, vol. vi, p. 126) says, that a man may get rid of his deeds by showing various matters, such as duress, mistake, or the like, but adds the qualification that *there must be nothing in the way of negligence on his own part*—as in entrusting his seal to his seneschal or his wife. Britton says, that a man may plead that the writing ought not to affect him, for when it was made he had lost his seal, and caused it to be cried, and published, at the churches and markets; so that if anything was made under that seal after a certain day on which it was lost, it ought not to affect him (book 1, ch. 29, pl. 17). A curious account is given in Mr. Nicholl's note (vol. 1, p. 364 of his edition) of a plea of this description, relating to the seal of Arnold de Thorley, which was met and defeated by production of a record of acknowledgment at the Hertford Assizes, 39 Henry III, of the seal in question, by the said Arnold; and two advertisements of the loss of a seal, warning the public that an instrument sealed with it after a certain day would be forgery, are given in Blount's Law Dictionary, tit. "Seal" and "Sigillum." The passage from Bracton is reproduced in Fleta, who wrote towards the end of the thirteenth century, but without any additional remarks.'

Neglect as to the custody of your property then, be it horses, seals, or transferable documents, may, where other persons are misled by ostensible title in possessors of them, estop the owner from following his property. This is general law and was not borrowed from the law-merchant².

Further Considerations in Support.—Acknowledging that there is

¹ 1887, 21 Q. B. D. 166; 57 L. J. Q. B. 418.

² In Pollock on Contracts, 6th ed., 135 n, referring to the loss of seals, it is said: 'That the practice of publishing formal notice in case of loss really existed is shown by the example given in Blount's Law Dictionary, s. v. *Sigillum*, dated 18 Ric. II. In modern law such questions, when they occur, come under the head of estoppel.'

not much direct and specific support for the propositions contended for in this article, it is nevertheless of interest to note the trend in that direction (culminating in something little short of formulation of the principles enounced), and to put in contrast the older view.

Commencing with money, it is usually said that the reason that a thief can pass a good title is because 'of the currency of it; it cannot be recovered after it has passed in currency'¹: that is, a good title to money passes because it is money. And if we ask for something more satisfactory than that we may find it in Lord Shand's remark (one hundred and thirty-five years afterwards) with reference to some cash which had been entrusted to an agent, and by him wrongfully diverted to his own purposes: 'He has thus the opportunity, and may take advantage of this to misapply and to appropriate to his own use the money intrusted to him².' This assertion must, however, find foundation in some specific law, and its proper reference is clearly apparent. The true owner enabled his agent to pose as owner, and is therefore estopped by the assistance rendered to his misrepresentation of ownership.

If the reason in the case of money was because it was money, the rule was applied to bills and notes because they are 'like so much money,' and are 'negotiable':—

'If a bill be payable to *A* or bearer it is *like so much money* paid to whomsoever the note is given; that let whatever accounts or conditions soever be between the party who gives the note, and *A* to whom it is given, yet it shall never affect the bearer³.'

'Bills of exchange and promissory notes are representatives of money circulating in the commercial world as such⁴.'

'The reason is that such negotiable instruments have, by the law-merchant, become part of the mercantile currency of the country⁵.'

'A negotiable instrument, for the general convenience of commerce, has been allowed to have an effect at variance with the ordinary principles of law⁶.'

Money passes with a good title because it is money; and notes because they are like money; and then a foreign bond because it is like a note.

'In its nature precisely analogous to a bank-note payable to

¹ Per Lord Mansfield, in *Miller v. Race*, 1758, Burr. p. 457. And so where a £5 gold-piece, which, although current coin, was something of a curiosity, had been stolen and sold to a dealer in curiosities, the title vested in the owner upon conviction of the thief: *Moss v. Hancock* [1899] 2 Q. B. 111; 65 L. J. Q. B. 657.

² *Thomson v. Clydesdale* [1893] A. C. 291; 62 L. J. P. C. 91.

³ *Crowley v. Crowther*, 1702, 2 Freeman, 257. And see per Channell B. in *Moss v. Hancock* [1899] 2 Q. B. 118; 68 L. J. Q. B. 657; Byles on Bills, 15th ed., 186; *Foster v. Green*, 1862, 31 L. J. Ex. 158.

⁴ *Friedlander v. Texas*, 1889, 130 U. S. 416.

⁵ Per Williams J. in *Ingham v. Primrose*, 1859, 7 C. B. N. S. 82.

⁶ Per Tindal J. in *Jenkyns v. Usborne*, 1844, 7 M. & G. 699; 13 L. J. C. P. 196.

bearer, or to a bill of exchange indorsed in blank. Being an instrument therefore of the same description it must be subject to the same rule of law that whoever is the holder of it has power to give title to any person honestly acquiring it¹.

The transition stage between mere empiricism and rationality may be represented by language of Lord Cairns with reference to certain misappropriated scrip for bonds:—

‘The appellant might have kept this scrip in his own possession, and if he had done so, no question like the present could have arisen. He preferred, however, to place it in the possession and under the control of his broker, or agent; and although it is stated that it remained in the agent’s hands for disposal, or to be exchanged for the bonds when issued as the appellant should direct, those into whose hands the scrip would come could know nothing of the title of the appellant, or of any private instructions he might have given to his agent.’

In other words, the broker had ostensible authority to sell; ostensible authority cannot be displaced by ‘private instructions’; therefore, although there was no authority to sell, yet the true owner is estopped from so asserting. That is the ordinary law of estoppel.

To the same effect, but much more nearly approaching scientific statement, is the language of Mr. Justice Taschereau, in a case in the Canadian Supreme Court, with reference to bonds: ‘In constituting his agent *the apparent absolute owner* of these securities and conferring upon him all the indicia of ownership, he *precludes* himself from disputing the title of any subsequent bona fide transferee².’ There is much in the United States authorities which may be cited in support of some of the views here advocated. For example, in *Colebrooke on Collateral Securities*, it is said:—

‘The principle of estoppel by conduct, that when the owner of property in any form clothes another with the apparent title and power of disposition, third parties who are thereby induced to deal with him are protected, is applied to choses in action, non-negotiable in character³.’

‘The rules of estoppel *in pais* are enforced against an owner of a non-negotiable chose in action who has, with mistaken confidence, entrusted the indicia of title, and the apparent absolute ownership, by endorsement and delivery to a third person, so that he is able to deceive bona fide pledgees advancing value upon the faith and credit of such documents of title and apparent absolute ownership,

¹ *Gorgier v. Micville*, 1824, 3 B. & C. 45.

² *Young v. MacNider*, 1895, 25 S. C. 272, 279.

³ P. 590; citing *Cowdry v. Vanderburgh*, 101 U.S. 572; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325. See to same effect, per Boyd C. in *Re Central Bank*, 1899, 17 Ont. 586.

without notice that the act of the pledgee is a fraudulent misappropriation, and an unauthorized act¹.

So also in *Bigelow on Estoppel*².

'It should be observed that while the rule in *Pickard v. Sears* finds most frequent expression in transfers of property, it is not confined to such cases; it includes all cases of false representation and fraudulent silence, whatever the nature of the transfer. . . . So again, if a man purchase bona fide and for value an unnegotiable chose in action, from one upon whom the owner has by assignment, or otherwise, conferred the apparent absolute ownership, he obtains a valid title against the real owner, supposing the act of purchase to have been induced by such act of the owner³.'

And in England in a case⁴ in which a transfer of shares, blank as to the purchaser's name, was given to a broker who misapplied it, Lord Herschell said:—

'If the owner of a chose in action clothes a third party with the apparent ownership and right of disposition of it, he is estopped from asserting his title, as against a person to whom such third party has disposed of it, and who received it in good faith and for value. And this doctrine has been held by the Court of Appeal of the State of New York to be applicable to the case of certificates of shares, with the blank transfer and power of attorney signed by the registered owner, handed by him to a broker who fraudulently, or in excess of his authority, sells or pledges them. The bank or other persons, taking them for value without notice, have been entitled to hold them as against the owner⁵. As at present advised, I do not see any difference between the law of the State of New York and the law of England in this respect⁶.'

It will be observed that these supporting quotations all deal with 'non-negotiable' choses in action. They sufficiently establish the principle that ostensible ownership or agency of such documents may estop the true owner from setting up his title to them. But it has not hitherto been observed that the same doctrine applies to

¹ P. 487; citing *Coombes v. Chandler*, 33 Ohio St. 178; *Moore v. Bank*, 55 N. Y. 41; *McNeil v. Tenth Nat. Bank*, 46 ib. 325; *Cowdry v. Vanderburgh*, 101 U.S. 572; *Davis v. Beckstein*, 69 N. Y. 442; *Werrich v. Mahoning Co. Bank*, 16 Ohio St. 296; *Dillaye v. Commercial Bank*, 51 N. Y. 345; *Clark v. Roberts*, 25 Hun. 86.

² 5th ed., p. 562; citing *Moore v. Metropolitan Bank*, 55 N. Y. 41; *Henty v. Miller*, 94 N. Y. 64; *Coombes v. Chandler*, 33 Ohio St. 178.

³ Mr. Bigelow did not observe the general application of this language in his later work (on Bills and Notes) when he wrote (p. 3): 'Purchase of land, or goods, for value, and without notice, cuts off equities; that is a cardinal rule of law, and always has been in courts of equity. But it has never been applied to undertakings to pay, in the case of common law contracts; applied to undertakings to pay, as purchase for value without notice often is, the principle has reference to bills, notes and cheques only.'

⁴ *Colonial Bank v. Cady*, 1890, 15 App. Cas. 267; 60 L. J. Ch. 131.

⁵ See *Montagu v. Perkins*, 1853, 22 L. J. C. P. 185.

⁶ For the New York law, see *McNeil v. Tenth Nat. Bank*, 1871, 46 N. Y. 325. See also in Ontario, *Smith v. Rogers*, 1899, 30 Ont. 256; and in Ireland, *Horne v. Boyle*, 1890, 27 L. R. Ir. 137; *Waterhouse v. Bank of Ireland* [1892] 29 L. R. Ir. 384; and in Minnesota, *Brown v. Equitable*, 1899, 78 N. W. Rep. 1045.

'negotiable' instruments also (why should it not?); and that there is no necessity for an appeal to the law-merchant and its antagonism to the ordinary law.

Or to put the matter more accurately, and sum up what has been said :—

(1) A chose in action is ambulatory or non-ambulatory. It may also be sometimes the one and sometimes the other. A promissory note, for example, may be ambulatory (redeemable to third persons), or non-ambulatory (redeemable to a certain person only). It is always 'negotiable' in the sense that being a chose in action arising out of contract it may be transferred. It is sometimes not 'negotiable,' in the sense that a transferee of it will take subject to equities.

(2) Contractors in ambulatory agreements are estopped as against innocent transferees from setting up equities which may exist between them and their contractees.

(3) The true owners of ambulatory contracts may be estopped from asserting their title to them, by permitting the appearance of ownership in other persons.

(4) These results are in no way due to the law-merchant; they are not in antagonism to the general law; they are parts of it.

(5) The word 'negotiability' with its *double entente* is not only unnecessary, it is disturbing and distracting.

Having thus opened up a new category, let us take a short survey of the instruments to be placed in it.

All the old 'negotiable' instruments are of course admissible.

And we must add foreign government and company bonds¹.

And domestic company bonds².

And scrip for bonds, that is to say, promises to deliver not money, but bonds³.

And scrip for shares⁴; that is to say, promises redeemable not in money but in property⁵.

And payable to order or bearer bonds, although secured by complicated mortgages⁶.

¹ *Gorgier v. Micville*, 1824, 3 B. & C. 45; *Simmons v. London Joint Stock Bank* [1891] 1 Ch. 270; 60 L. J. Ch. 313; [1892] A. C. 201; 61 L. J. Ch. 723; *Bentinck v. London Joint Stock Bank* [1893] 2 Ch. 120; 62 L. J. Ch. 358; *Venables v. Baring* [1892] 3 Ch. 527; 61 L. J. Ch. 609.

² *Re General Estates*, 1868, L. R. 3 Ch. 758; *Higgs v. Northern*, 1869, L. R. 4 Ex. 387; 38 L. J. Ex. 233; *Re Imperial Land Co.*, 1870, L. R. 11 Eq. 478; 40 L. J. Ch. 93 (but see *Crouch v. Credit Foncier*, 1873, L. R. 8 Q. B. 374; 42 L. J. Q. B. 183); *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658; 67 L. J. Q. B. 986.

³ *Goodwin v. Roberts*, 1875, L. R. 10 Ex. 76; ib. 345; 1 App. Cas. 476; 45 L. J. Q. B. 748.

⁴ *Rumball v. Metropolitan*, 1877, 2 Q. B. D. 194; 46 L. J. Q. B. 346.

⁵ *Atlanta v. Hunt*, 1897, 100 Tenn. 89; 42 S. W. Rep. 482.

⁶ *Webb v. Herne Bay*, 1870, L. R. 5 Q. B. 642; 39 L. J. Q. B. 221; *Fogg v. School District*, 1898, 75 Mo. App. 159. But see *Parmenter v. Cobrick*, 1897, 45 N. Y. S. 748; 53 N. Y. S. 1111.

And letters of credit¹.

And blank transfers of shares².

And deposit-receipts³.

These and other such instruments are clearly intended to be ambulatory; and reason and authority concur in putting them in the same category.

The present writer would add bills of lading, warehouse receipts⁴, delivery orders, and other well-known indicia of title to goods. If one reflects upon 'negotiability' and its technicalities, such instruments, of course, fail to reach the standard. They are for goods, and not for money—were there no other objection to them. When, however, we remember that scrip for *bonds* (not for money) are already in the list, it is hard to see why agreements to deliver goods must necessarily be left off. Are they intended to be ambulatory? that is the question. If so, the original contractor cannot set up his equities against an innocent transferee; and a true owner must keep possession, and not, by parting with it, permit the appearance of ownership in another person.

There are other documents about which there may be a greater difference of opinion; but which the writer thinks ought to be dealt with according to the principles with which we have been considering:—

Vouchers.—Sometimes vouchers or certificates indicating that persons named in them are entitled to certain sums of money are intended to be ambulatory, and transferees will therefore, upon the principles of estoppel, take free from equities. In one case⁵ a contractor obtained a certificate from the auditor of a Board of Works, that he was entitled to \$8451.88; the contractor endorsed the certificate in blank, and deposited it as security for a loan of \$3160; and the pledgee fraudulently disposed of it to an innocent purchaser; it was held that—

'The complainants could have expressed in their endorsement the purpose of the deposit . . . that it was as security for a specified sum of money—and thus imparted notice to all subsequent pur-

¹ *Re Agra & Masterman's Bank*, 1867, L. R. 2 Ch. 391; 36 L. J. Ch. 222; *Johannessen v. Munroe*, 1899, 185 N. Y. 641; 53 N. E. Rep. 535.

² *Ante*, p. 154.

³ See 3 & 4 Anne, c. 9; *Nicholson v. Sedgwick*, 1690, 1 Ld. Ray. 180; 3 Salk. 67; *Partridge v. Bank of England*, 1846, 9 Q. B. 396; *Re Commercial Bank*, 1897, 11 Man. 494; *Re Central Bank*, 1889, 17 Ont. 574; *First Nat. Bank v. Security*, 1892, 51 N. W. Rep. 303; 34 Neb. 71; *Kirkwood v. First Nat. Bank*, 1894, 58 N. W. Rep. 1016; 40 Neb. 484; *Sauce v. Exchange*, 1894, 58 N. W. Rep. 1135; 40 Neb. 497; *Hagar v. Buffalo*, 31 N. Y. 448; *Auten v. Craham*, 1899, 81 Ill. App. 502.

⁴ *Collins v. Rosenbarn*, 1897, 43 S. W. Rep. 726 (Ky.). See the Alabama Code, sec. 4222; and *Danforth v. McElroy*, 1899, 25 So. Rep. 840.

⁵ *Cowdry v. Vanderburgh*, 1879, 101 U. S. 572. And see *Cudahy v. Sioux, &c.*, 1896, 75 Fed. Rep. 473; *Moore v. Metropolitan*, 1873, 55 N. Y. 41. See also *Armour v. Michigan, &c. Railway*, 1875, 65 N. Y. 123.

chasers or assignees, that the pledgee held only a qualified interest in the claim. But having endorsed their name in blank, they virtually authorized the holder to transfer or dispose of the certificate by writing an absolute assignment over their signature.'

Mortgages.—It is interesting to note the application of the principles in hand to the case of a mortgage. Here we have a debt—a chose in action¹ and real estate security for its payment. By its terms, and according to usage, the document is intended to be ambulatory; but the transfer of it is a matter requiring time for its accomplishment, and it is therefore unsuitable for the rapid financial operations of the moment; moreover its payments are usually long deferred, and thus changes in the relations of the parties to it are more customary than in the case of shorter dated commercial paper.

The law of estoppel has adapted itself to these peculiarities. It is customary for a purchaser of a mortgage to make inquiries of the mortgagor as to the state of the account between him and the mortgagee, and it is not doubted that by his answers the mortgagor would be estopped. No such inquiry is made in the case of bills and notes, and transferees of them are not affected by premature payments. The reason is to be found in custom, and the custom is founded upon the considerations above suggested. Estoppel proceeds upon misrepresentation. In the case of a mortgage, premature payment will not mislead, because of the custom to inquire, which the mortgagor may depend upon being pursued. There is no such custom in the case of bills and notes; premature payment will mislead; and the payer may have to pay again.

But observe that, if a mortgage be offered in sale to me, although I ought to inquire as to alterations of relations between the parties, I have no reason for doubting that the document was originally a real instrument, and that it truthfully represents the transaction between the parties. For example, if £200 appears to be secured by it (and more especially if a receipt for that amount is endorsed upon it), I am not bound to imagine that only £40 was really advanced. The mortgagor knew when executing the document that it was of ambulatory character; he knew that people would rely upon his receipt; and he is therefore estopped²:—

'But they were inexact and careless, and placed in the hands of *Bates or Astley* the means of deceiving other persons, and these are in the view of a Court of Equity demerits³.'

¹ *Martin v. Bearman*, 1880, 45 U. C. Q. B. 205. See, however, *Hopkins v. Hemsworth* [1898] 2 Ch. 347; 67 L. J. Ch. 526.

² *Bickerton v. Walker*, 1885, 31 Ch. Div. 151; 55 L. J. Ch. 227; *Chambers v. Goldwin*, 1804, 9 Ves. at p. 264; approved in *Mangles v. Dixon*, 1852, 3 H. L. C. p. 737.

³ Per Fry L. J., 31 Ch. Div. at p. 158.

This law is of special importance in the United States, where usually a mortgage debt is represented by a promissory note. It was there said that the mortgagor was estopped upon principles,

'which forbid a man who, as security for negotiable notes, had executed a mortgage . . . to impair its binding force and effect by pleading secret equities, created by his own fault, negligence or imprudence, and of which the subsequent holder of the notes had no notice, and no means of information¹.'

Life Policies.—Drawing still further away from the former narrow list of 'negotiable' securities, we come to a document of debatable character. The owner of a life insurance policy transferred it, apparently absolutely, but really as security only, for money lent; the assignee, being thus the ostensible owner, fraudulently assigned the policy to an innocent purchaser; who, it was held, took it free from equities². It may be said that a policy is a 'non-negotiable' chose in action, and that it therefore carries with it all equities of prior holders³; a fair reply is that lands too are somewhat 'non-negotiable'; but that if an owner of real estate executes an absolute conveyance to his mortgagee instead of a mortgage, he is estopped from setting up his equities as against an innocent purchaser from the grantee. In other words, a life policy is an article of property; and the principles of estoppel by ostensible ownership apply equally to all sorts of property which is intended to be passed on from one person to another.

Promises to Pay Money.—It is a most curious fact, and one which illustrates the frequently baneful effect of codifications, that while the law has been thus rapidly expanding upon the lines above indicated, so that we are now fairly well able to say that choses in action pass to a transferee free from equities, where that was the intention of the parties (the wit of man has at length come that far), certain promises to pay money to order or bearer, on the other hand, by recent decisions in England and Canada, bid fair to become an exception to the rule.

¹ *Bank v. Flathers*, 1892, 45 La. Ann. 78; 12 So. Rep. 244: approved in *Pertuit v. Damare*, 1898, 24 So. Rep. 680. In Kansas, however, it is held that the note itself is 'non-negotiable' if it refer to the mortgage: *Jones v. Dulick*, 1898, 55 P. Rep. 522. In Illinois it is held that the assignee takes subject to the equities; *Faris v. Briscoe*, 78 Ill. App. 242.

² *Quebec Bank v. Taggart*, 1896, 27 Ont. 162. And see *Wells Bridge v. Connecticut*, 1890, 152 Mass. 343.

³ And it was very recently so held: *Brown v. Equitable*, 1899, 78 N. W. Rep. 103 (Minn.):—'The defendant has done nothing upon which to base an equitable estoppel, except the bare fact that plaintiff delivered possession of the policy to H accompanied by an absolute assignment without any expressed conditions or limitations, and thereby clothed with the indicia of absolute ownership.' Usually the bare fact of enabling another person to mislead third persons by appearing to be the owner of your property is thought to be an amply sufficient ground of estoppel.

A promissory note is by the Codes closely defined. This is within the prescribed limits, and that is not. Any addition to the given form takes the document out of the category of notes. And if it is not a note, then it is held that all its equities accompany it upon transfer¹. The result therefore is that a document which is very nearly a promissory note or bill of exchange carries its equities with it (even if it be one intended to be redeemable to third persons) because of the Codes; while documents having no relation to bills or notes (and very much less like them), but which are intended to be ambulatory, do not. The fault of the decisions is that they are still using the old classification of 'negotiable' and 'non-negotiable' instruments². The language of *Malins V.-C.*, of thirty years ago, ought to be recognized as something more than a notion of a somewhat radical judge:—

'Are they then promissory notes or debentures? or does it make any difference which they are in the result? My opinion is that whichever they are the result is the same, because they in any case make a contract by which the company have bound themselves to pay, not to any particular person, but to any person who may be the bearer, the sum appearing to be due upon their face³.'

Conclusion.—Enough has been said to indicate the safe line of further development.

Lands are intended to be transferred; so are goods; so are some choses in action.

The law as to all such classes of property is the same. Ostensible ownership or agency may estop the true owner from setting up his title as against an innocent purchaser.

The primary question then as to any particular chose in action is whether it was intended to be redeemed to the immediate contractee or to third persons also. It is not sufficient to ask whether or not it is a note or bill, for even so it may be ambulatory or non-ambulatory, and have to be classified accordingly.

When the character of the document has been ascertained, either by its form or by usage with reference to the class of instruments to which it belongs, the law of estoppel and not the law-merchant, the ordinary law and not antagonism to it, will suffice for the settlement of all questions relating to the rights of innocent transferees.

JOHN S. EWART.

¹ *Kirkwood v. Smith* [1896] 1 Q. B. 582; 65 L. J. Q. B. 408; *Bank of Hamilton v. Gilles*, 1899, 12 Man. 495.

² The cases in the United States vary very much as to the effect of unusual clauses in notes. The most recent of them are *Citizens v. Booz*, 1898, 75 Mo. App. 189; *Louisville v. Gray*, 1899, 26 So. Rep. 205 (Ala.); *Third Nat. Bank v. Spring*, 1899, 59 N. Y. S. 794; *Sclauch v. O'Hare*, 1899, 22 Pa. Co. Ct. 384.

³ *Re Imperial Land Co., &c.*, 1870, L. R. 11 Eq. p. 488.

ELECTION BETWEEN ALTERNATIVE REMEDIES.

IN the January number of the Law Reports appears the case of *Rice v. Reed*¹. The facts in the case were shortly these:—The plaintiff was a fur skin dyer, who used in his works large quantities of sawdust. One Henry Soltau, in the plaintiff's employment, sold without his authority large quantities of sawdust to the defendant, who bought knowing that the sales were unauthorized, and paid by cheques which Soltau lodged to his account at the Birkbeck Bank. The plaintiff brought an action against Soltau and the Bank, claiming (1) damages for conversion against Soltau, and alternatively (2) money had and received against Soltau and the Bank. On the day of the issue of the writ the plaintiff applied for, and soon afterwards obtained, an interim injunction restraining Soltau and the Bank from parting with the proceeds of the sales until the trial of the action. A month or so after obtaining this injunction, the plaintiff brought a separate action against the defendant for conversion; after which he settled the former action against Soltau and the Bank, receiving from the latter a sum of £1000, which represented so much of the proceeds of the sales as remained to Soltau's credit at the Bank. The defendant pleaded a waiver of the tort and election to sue for money had and received; but judgment was given for the plaintiff.

We cannot clear our minds of a doubt whether this case was rightly decided; not on account of the settlement of the action against Soltau and the Bank and the receipt of the proceeds of the sale, for that settlement, being made without prejudice to the plaintiff's rights against the defendant Reed, operated merely as a covenant not to sue, and not as a discharge of the right of action². The doubt is whether the successful application for the interim injunction in the action against Soltau and the Bank did not operate as a conclusive election to waive the tort and sue for money had and received. If it did so operate, it is clear that the plaintiff's remedy by action for conversion was gone, and there ought to have been judgment for the defendant.

Those who are rash enough to express doubts touching the soundness of a decision of the Court of Appeal are bound to give reasons for those doubts; in order to do this it is necessary to go

¹ [1900] 1 Q. B. 54.

² *Duck v. Mayou* [1892] 2 Q. B. 511.

at some length into the nature of an election between alternative remedies.

Now alternative remedies may be (a) similar remedies 'against either of two persons; (b) different remedies against the same person; (c) different remedies against different persons. As an example of the first class may be taken the case where a vendor sells goods to a purchaser who is in fact agent for another. Here the vendor may recover the price of the goods against either the agent or the principal. He cannot recover from both. As an instance of the second class may be taken the case where the defendant wrongfully sells and receives the proceeds of the plaintiff's goods. Here the plaintiff may recover damages for conversion, or he may waive the tort and sue for money had and received. He cannot do both. As an extension of the second class it may be observed that except where the wrongful sale is in market overt, or the plaintiff has held out the wrongful vendor as his agent for sale, or the wrongful vendor is a 'mercantile agent' under the Factors Acts, the remedy in conversion extends against the purchaser of the goods. The plaintiff may then bring an action for money had and received against the vendor, or conversion against the vendor and purchaser. He cannot do both. This is an instance of the third class, and to this class the case of *Rice v. Reed* belongs. If in such a case the plaintiff chooses his remedy in conversion he cannot sue the vendor for money had and received; if he chooses his remedy for money had and received he cannot sue vendor or purchaser for conversion. When he has once elected in favour of one remedy he cannot afterwards pursue the other and alternative remedy. There is no doubt that he is not bound to make his election at once; he may wait and think which way he will exercise his election, so long as he can do so without injuring other persons—per Lord Blackburn, *Scarf v. Jardine*¹—and in this interval he may do acts which are consistent with an intention ultimately to pursue either remedy. But in the course of time there must happen some event marking the point at which the line of equivocal acts ends, the dividing of the way after which one step in either direction excludes any progress in the other. To find this point is the difficulty.

It is futile to attempt an exposition of general legal principles otherwise than by their application to particular facts. But some selection is desirable in the choice of those facts from which it is proposed to deduce the principle. If in one set of circumstances a general principle applies while in another widely different set of circumstances it does not, the discriminant factor is not easily

¹ 1882, 7 App. Cas. at p. 360.

detected; and therefore the best method of pointing a legal principle is by citing two cases, or groups of two, differing slightly in their facts but widely in principle, for then it is reasonable to infer that the difference in principle is to be found in the difference of fact, and as this is slight the margin of error is narrow.

In considering the question what is and what is not an election, we are fortunate in having several decided cases for our guidance very similar in their facts, some ranged on each side of the dividing line. It is proposed to state them briefly without further preface.

In *Brewer v. Sparrow*¹ the defendant had wrongfully sold certain goods, the property of a bankrupt. The assignees of the bankrupt received the accounts of the sale, and accepted from the defendant the balance appearing due on the accounts. It was held that they had elected to ratify the sale, and that they could not afterwards sue the defendant for conversion.

On the other hand, in *Valpy v. Sanders*², the defendant had wrongfully possessed himself of certain goods, the property of a bankrupt. The assignees of the bankrupt demanded, but did not receive, the price of the goods as upon a sale. It was held that they had not elected to ratify the sale and that they might afterwards sue the defendant for conversion. It is clear then that acceptance of the proceeds as money had and received is an election in favour of the remedy by action for money had and received, which precludes the plaintiff from prosecuting the alternative remedy by action for conversion.

Again in *Lythgoe v. Vernon*³ the defendant had wrongfully sold certain goods the property of the plaintiff. The plaintiff demanded the proceeds of the sale, and the defendant paid all but £3 4s. The plaintiff then sued in conversion and the defendant paid the balance of the proceeds into Court. It was held that the plaintiff had elected in favour of the remedy for money had and received, and that he could not sue for conversion. On the other hand, in *Burn v. Morris*⁴, the plaintiff lost a Bank of England note for £20. This note was found by A, who took it to the defendant to get it changed. The defendant got it changed and gave A £18 for it, keeping the balance himself. The plaintiff afterwards arrested A and brought him before the Lord Mayor, who ordered A to restore to the plaintiff £7, all that remained in his possession of the £18 he had received. The plaintiff, having thus recovered £7, sued the defendant in trover and recovered damages £13. The Court held that there was no election, but that the plaintiff had a right of action in trover against both A and the defendant, and, having merely got

¹ 1827, 7 B. & C. 310.

³ 1860, 5 H. & N. 180.

² 1848, 5 C. B. 886.

⁴ 1834, 2 Cr. & M. 570.

part of the damages from *A*, might recover the balance from the defendant. This case is further discussed hereafter.

In *Morris v. Robinson*¹ the defendant had wrongfully sold some indigo, the property of the plaintiff, and had paid the proceeds into the Vice-Admiralty Court at Mauritius. The plaintiff, by his agent at Mauritius, made a claim for the proceeds, but as they had been remitted to England the claim was unsuccessful. It was held that there had been no election, but that the plaintiff might sue the defendant for conversion. On the other hand, in *Smith v. Baker*², the plaintiff was the trustee of a bankrupt who had given to the defendant a bill of sale void as against the plaintiff. The defendant had sold the goods. The plaintiff made an application to the Court of Bankruptcy for an order that the defendant should pay over the proceeds of the goods. The order was made, and the proceeds paid under it to the plaintiff. The plaintiff then sued the defendant in trover for the difference between the proceeds of the sale and the value of the goods. But it was held that by obtaining the proceeds under the order he had elected in favour of the remedy by action for money had and received. Here again the success of the application and receipt of the proceeds of the wrongful sale is the determining fact.

Again in *Curtis v. Williamson*³ the plaintiff had sold goods to one who was an agent for the defendant. The agent became insolvent and filed a petition for the liquidation of his estate. The plaintiff filed an affidavit in the liquidation stating that the agent was justly and truly indebted to him for the price of the goods sold. In fact this affidavit was filed by inadvertence, and, upon better advice, an attempt was made to prevent its being filed, but too late; however, the plaintiff took no further step in the liquidation, and no dividend was ever received from the agent's estate. It was held that there was no election. But it was otherwise in *Scarf v. Jardine*⁴. In that case two partners, Rogers and Scarf, carrying on business as W. H. Rogers & Co., dissolved partnership, Scarf retiring. Rogers took another partner, Beech, with whom he carried on business under the old firm name. A customer of Rogers and Scarf sold and delivered goods to Rogers and Beech after, but without notice of, the change in the firm. After receiving notice of the change he sued the new firm and, upon their bankruptcy, filed an affidavit stating that they were justly and truly indebted to him for the price of the goods sold, a statement on which he was still insisting. It was held that this was an election

¹ 1824, 3 B. & C. 196; 27 R. R. 322.

³ 1874, L. R. 10 Q. B. 57.

² 1873, L. R. 8 C. P. 350.

⁴ 1882, 7 App. Cas. 345.

after which the customer could not sue Scarf, the former member of the old firm.

To complete our digest we would add the case of *Armstrong v. Allen*¹. There the plaintiff was a manufacturer, and had sold to shippers certain goods to be delivered alongside a vessel and paid for in cash in exchange for a clean receipt. The defendants were shipowners, and by a contract between them and the shippers, the defendants were to receive no goods for the shippers unless a clean receipt could be given. The plaintiff delivered the goods to the shipowners, the defendants; who, though they received the goods, refused to give a clean receipt. The plaintiff demanded the goods back, but as other cargo had been loaded on top of them the defendants refused to redeliver, and the goods were forwarded to consignees abroad. The plaintiff issued a writ in trover against the defendants. The consignees accepted the goods and paid for them. The shippers paid, and the plaintiff accepted the purchase price under the contract of sale. It was held by the Court of Appeal that he could not after that proceed with his action for conversion.

So much for particular instances. For statements of the general principle the following may serve: 'A man cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage': per Honyman J., *Smith v. Baker*². This passage from the judgment of Honyman J. was cited and approved by the Court of Appeal in *Roe v. Mutual Loan Fund*³. 'If the party electing has done—whether he intended it or not—an unequivocal act, i. e. an act which would be justifiable if he had elected one way, and would not be justifiable if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election': per Lord Blackburn, *Scarf v. Jardine*⁴. In *Clough v. London and North Western Railway*⁵, Mellor J., in delivering the judgment of the Court of Exchequer Chamber, lays down the well-known doctrine that a vendor who has been by fraud induced to part with his goods, may on discovering the fraud elect to treat the transaction as valid or invalid. He continues⁶:

'It seems to us clear on principle that a statement in a plea by the party from whom the property has passed, that he claims back the property on the ground that he was induced to part with it by fraud, is as unequivocal a determination to avoid the transaction as could well be made. . . . After succeeding by means of such a plea

¹ 1893, 67 L. T. 738.

² 1887, 19 Q. B. D. 347.

³ 1871, L. R. 7 Ex. 27.

⁴ 1873, L. R. 8 C. P. 350.

⁵ 1882, 7 App. Cas. 345.

⁶ *Ibid.* p. 36.

the person pleading it could never successfully set up the contract as still valid, either against the plaintiff in the action in which the plea was pleaded, or any one else.'

We are now in a position to offer a few remarks on the case of *Rice v. Reed*¹. But before coming to the main decision, one of its outward phases should be noticed. It is feared that in days to come the case will be cited as an authority that there can be no election short of a judgment on one of the alternative causes of action. The only authority for such a proposition, so far as we know, is a dictum of Bramwell B. in *Priestly v. Fernie*².

'The very expression that where a contract is made by an agent in his own name, the contractee has an election to sue agent or principal, supposes he can only sue one of them, that is to say, sue to judgment. For it may be that an action against one might be discontinued, and fresh proceedings be well taken against the other.'

The question in that case was whether a judgment unsatisfied against the agent amounted to an election, and it was held, and no one would now dispute it, that it did. The dictum was therefore unnecessary for the decision of the case. As against it there is the equally weighty dictum of Lord Blackburn in *Scarf v. Jardine*³ that the issue of the writ is the important act, and that judgment or no judgment is immaterial. But we need not trouble ourselves with dicta when we have the decided cases of *Brewer v. Sparrow*⁴, *Lythgoe v. Vernon*⁵, and *Armstrong v. Allen*⁶, in each of which it was held that there had been an election before ever judgment was recovered.

To come now to closer quarters with the case of *Rice v. Reed*⁷. It purports to rest on the authority of *Burn v. Morris*⁸, and *Morris v. Robinson*⁹. The former was the case above referred to of the bank-note; it was not a case of election; the property converted never changed its nature so as to make acceptance of part of it referable to a right or cause of action different from that which was ultimately prosecuted. In the words of Lord Mansfield

'The whole fallacy turns upon comparing bank-notes to what they do not resemble, and what they ought not to be compared to, viz. to goods. . . . Now they are not goods . . . but are treated as money, as cash, in the ordinary course and transaction of business by the general consent of mankind; which gives them the credit and currency of money to all intents and purposes. They are as much money as guineas themselves are; or any other current coin, that is used in common payments, as money or cash¹⁰.'

¹ [1900] 1 Q. B. 54.

² 1827, 7 B. & C. 310.

³ [1900] 1 Q. B. 54.

⁴ 1824, 3 B. & C. 196; 27 R. R. 322.

⁵ 3 H. & C. 977.

⁶ 1860, 5 H. & N. 180.

⁷ 1834, 2 Cr. & M. 570.

⁸ See *Miller v. Race*, 1 Burr. 452.

⁹ 1882, 7 App. Cas. 345.

¹⁰ [1893] 67 L. T. 738.

The plaintiff, therefore, having been deprived of money, recovered part of it back again; it is hard to see how this should prevent him recovering the balance, even by another remedy.

In *Morris v. Robinson*¹ the plaintiff, having alternative remedies for conversion and for money had and received, applied to a Court for payment of the money, but his application was ineffective. It was held that he had not elected. But as we have seen, it is different where the application is effective: *Smith v. Baker*². Accordingly, *Morris v. Robinson*¹ is no authority for a case where an application is made and granted, which happened in *Rice v. Reed*³.

There the plaintiff had two alternative-remedies, one for money had and received against Soltau and the Birkbeck Bank, the other for conversion against Soltau and Reed. In fact, he sued Soltau alone for conversion and, alternatively, Soltau and the Bank for money had and received. Then he applied for and obtained an interim injunction restraining Soltau from drawing out and the Bank from parting with the proceeds of the sales until the trial of the action. Of which action? we may ask. Assuredly not the action for conversion. A plaintiff, suing a defendant for the proceeds of a wrongful sale, may possibly have an injunction to restrain the defendant and his bankers from dealing with the proceeds. He may say, 'I undertake to prove that these persons are in possession of my money. If they are not I will recompense them for any loss they may sustain through being obliged to hold the money *in statu quo*. Meanwhile, and until I can in due course of law prove that the money is mine, it is fair and just that they should not be allowed to part with it.' The interim injunction is justifiable then if the plaintiff sues for money had and received.

'Look you now what follows.' A plaintiff suing for unliquidated damages in trover or conversion applies to the Court for an injunction to restrain the defendant from dealing with his balance at the bank. More than that, he applies for an injunction to restrain the defendant's bankers from honouring his cheques. The case is the same, but it appears more grotesque, if we imagine a plaintiff in an action of deceit, or still more, in an action of libel, applying for such an injunction. By the law of England a man is entitled to deal freely with his property, notwithstanding the issue of a writ for unliquidated damages, and the Court has no power to restrain him from dealing with it. In short, this injunction is not justifiable if the plaintiff sues for conversion. But 'if the party electing has done an unequivocal act, i. e. an act which would be justifiable if he had elected one way, and would not be justifiable

¹ 1824, 3 B. & C. 196; 27 R. R. 322.

² 1873, L. R. 8 C. P. 350.

³ [1900] 1 Q. B. 54.

if he had elected the other, the fact of his having done that unequivocal act to the knowledge of the parties concerned is an election': per Lord Blackburn, *Scarf v. Jardine*¹. The plaintiff could only have obtained the advantage of having the money kept *in statu quo* on the footing that he was suing for money had and received. He could not sue for money had and received without saying that the sale of the sawdust was a valid sale. But 'a man cannot say at one time that a transaction is valid, and thereby obtain some advantage to which he could only be entitled on the footing that it is valid, and at another time say that it is void for the purpose of securing some other advantage': per Honyman J., *Smith v. Baker*², approved by the Court of Appeal in *Roe v. Mutual Loan Fund*³. He could only have got the injunction by pleading that he authorized the sale, and that the proceeds were his; but 'after succeeding by means of such a plea, he could never successfully set up' that the sale was unauthorized 'either against the' defendant 'in the action in which the plea was pleaded or any one else': per Mellor J. in *Cam. Scac., Clough v. London and North Western Railway*⁴.

It is sometimes suggested that to apply for and obtain an interim injunction is not an unequivocal but an equivocal act, because the Court imposes on the party obtaining it an undertaking in damages, and the defendant against whom it is granted can be compensated, and is therefore not injured if the plaintiff does not prosecute the action in which he obtained the injunction. With deference, that is not the test. The test is whether the injunction, with the attendant undertaking in damages, is a proceeding equally consistent with either of the alternative remedies. If it is consistent only with one of them the plaintiff who obtains it has done an unequivocal act; for, being entitled to one only of two alternative remedies, he is not entitled to the relief incident to each of them. Suing in conversion, he was no more entitled to this interim injunction than he would have been to an order that the defendants should bring money into Court in proceedings under Order XIV.

For these reasons it is submitted that the plaintiff in *Rice v. Reed* elected in favour of his remedy by action for money had and received, and that he was not therefore entitled to sue the defendant for conversion.

WALTER HUSSEY GRIFFITH.

¹ 1882, 7 App. Cas. 345.

² 1887, 19 Q. B. D. 347.

³ 1873, L. R. 8 C. P. 350.

⁴ 1871, L. R. 7 Ex. 27.

NEGLIGENCE IN RELATION TO PRIVACY OF CONTRACT.

I.

IT is sufficiently obvious that, from a purely logical standpoint, the natural and probable consequences which the common law declares to be the measure of a man's liability for a negligent act include the likelihood that a certain individual will be injured as well as the likelihood that he will be injured in a certain manner. If, therefore, the courts had carried out that doctrine consistently, the question whether the plaintiff was one of those persons to whom the duty of exercising reasonable care was owed by the defendant, would be decided by the same standard as the question whether there was a causal connexion between the given breach of that duty and the physical changes which constituted the injury in suit. That is to say, the issue proposed would be, whether the defendant ought, as a man of ordinary sense and intelligence, to have seen that, if he should be careless in respect to the given subject-matter, persons coming within the same category as the plaintiff would probably suffer damage.

In the countries where the common law is administered, however, the course suggested by these obvious considerations has not been pursued. It is true that the courts, in dealing with one large class of cases, viz., those in which the injury was the direct result of the use of an agency which was under the immediate control of the defendant at the time when the plaintiff was damaged by it, have naturally and perforce worked out a theory of liability which confers a right of action upon the same classes of persons as would have that right if the test of reasonable anticipation had been consciously applied. Under no conceivable scheme of juridical responsibility could a defendant be heard to allege that a person who was, as a matter of fact, injured by reason of his contact with or proximity to real or personal property which the defendant then controlled, was not one of those persons whom a reasonable man would have expected to suffer injury from such contact or proximity¹.

¹ See *Elliott v. Hall*, 1885, 15 Q. B. D. 315, where this point is clearly brought out. It was laid down in a recent case by Lord Justice Bowen that, 'if the owner of

The applicability of the fundamental principle, *Sic utere tuo, ut alienum non laedas*, is here so manifest that there is no room for controversy as to the extent of responsibility¹. But in the cases where this element of control cannot be treated as a determinative factor—the cases, that is to say, whose common distinctive feature is the circumstance that the plaintiff has been injured through the negligence of other parties in respect to a transaction to which he was a stranger—it is only very recently and to a very limited extent that judges have shown any willingness to determine the question whether the plaintiff was one of those persons to whom the defendant owed a duty to use care upon a theory which would ascribe a proper weight to the doctrine of probable consequences (see X, post). This disregard of a fundamental principle has borne its natural fruit in a series of decisions which furnish as deplorable illustration as can be mentioned of the characteristic defects of 'the lawless science of our law.'

The obscurities which beset the subject have been greatly aggravated by the very unpraiseworthy ingenuity which judges have commonly exerted to confine their discussions and their rulings within the narrowest possible boundaries. Even the House of Lords which, as a general rule, is not lacking in a due appreciation of the obligations incumbent upon it, as a court of last resort in a country where most of the codification of the law must for the present be carried on by the collation of earlier decisions, has in this instance chosen the worse part. In the recent case of *Mulholland v. Caledonian Railway Co.*² it has had for the first time an opportunity of expressing its views as to the theory upon which the limits of liability for negligence should, as respects persons, be fixed; but it has failed entirely to rise to the occasion. When it is remembered how much trouble questions of the type involved have given the courts since the ruling in *Langridge v. Levy*³, the contracted scope of the arguments seems to amount to a sort of dereliction of duty.

premises knows that his premises are in a dangerous condition, and that people are coming there to work upon them by his own permission and invitation, of course he must take reasonable care that those premises do not injure those who are coming there'; that 'it is because he has the conduct and control of premises which may injure persons whom he knows are going to use them and who have a right to do so, that he is bound to take care to protect those persons who will thus be brought into connexion with him'; and that a similar obligation and for a similar reason arises, where the thing so controlled is a chattel. *Le Lièvre v. Gould* [1893] 1 Q. B. 491. Compare *Heaven v. Pender*, 1882, 9 Q. B. D. 302, per Cave J.; *Smith v. Steele*, 1875, 10 Q. B. 125, per Blackburn J.; *Collis v. Selden*, 1868, L. R. 3 C. P. 495, per Bovill C. J.; *Scholes v. Brook*, 1891, 63 L. T. N. S. 837.

¹ 'Where is the duty of care? I answer that duty exists in all men not to injure the property of others.' *Hayn v. Culliford*, 1879, 4 C. P. D. 182, 185, per Bramwell B.

² [1898] A. C. 216.

³ 1837, 2 M. & W. 519.

Unsatisfactory as this case is, however, it marks the completion of an important stage in the development of this branch of law. As a deliberate judgment of the highest court of the Empire, it will not only operate as a final settlement of such questions as actually fall within its scope, but will have a considerable influence in determining the trend of judicial opinion with respect to points upon which it does not directly touch. The time seems not inopportune, therefore, for a survey of the whole subject which is dealt with in one of its phases by this decision. It will be convenient to assume, for the sake of simplicity, that we always have to do with persons whose exposure to the dangerous conditions which caused their injury occurred while they were in the exercise of some right which it is permissible, in the present connexion, to describe as perfect. Such modifications as these principles may demand in any particular case, where the plaintiff's rights are of the inferior grade, denoted by the terms 'mere licensee,' and 'volunteer,' or 'trespasser,' can be readily supplied. It would be still more out of place, in a general investigation like the present, to take any account of the theory, elaborated by Bowen L. J., in *Thomas v. Quartermaine*¹, that the maxim, *Volenti non fit iniuria*, operates by negating the existence of a duty in regard to the persons who bring themselves within its terms.

II.

The only available starting-point for an investigation which the decisions suggest seems to be the principle, that an action for injuries resulting from negligence in respect to a subject-matter which is covered by a contract cannot, as a general rule, be maintained by one who is a stranger to that contract. The discussion upon which we are entering may, therefore, be appropriately opened with the statement that this principle has been recognized in cases where the contract was one of sale², of bailment³, for the manufacture of a specific article⁴, for work and labour with

¹ 1887, 18 Q. B. D. 625. The observations of Lord Esher in *Yarmouth v. France*, 1887, 19 Q. B. D. 647 (pp. 652, 657), and of Lord Halebury and Lord Herschell in *Smith v. Baker* [1891] A. C. 325 (pp. 336, 366), show that this theory has by no means found such universal acceptance that it can be placed on the same footing as the doctrines respecting the position of one who is and of one who is not invited to enter on premises or use a chattel.

² *Langridge v. Levy*, 1837, 2 M. & W. 519, 4 M. & W. 337; *Winterbottom v. Wright*, 1842, 10 M. & W. 109; *Longmeid v. Holliday*, 1851, 6 Exch. 761; *George v. Skivington*, 1869, L. R. 5 Exch. 1, per Cleasby B.

³ *Caledonian Railway Co. v. Mulholland* [1898] A. C. 216; *Heaven v. Pender*, 1883, 11 Q. B. D. 503.

⁴ *Francis v. Cockrell*, 1870, L. R. 5 Q. B. 184, per Hannen J., *arguendo*.

reference to a chattel¹, for professional services², and for the transmission of telegrams³.

III.

It can scarcely be doubted that this arbitrary doctrine is, to some extent at least, one of the inconvenient legacies bequeathed to modern English law by the old technicalities as to forms of action. The standpoint of the judges by whose decisions it was established in its present form is indicated unmistakably by the remark of Lord Abinger in *Winterbottom v. Wright*⁴ that the cases in which the law permits a contract to be turned into a tort, except those in which some public duty has been undertaken or public nuisance committed, are all cases in which an action might have been maintained on the contract. It was considered, therefore, that the combined effect of this principle and of the rule that no one but a party to a contract can sue on it was, that in no case whatsoever can any right of action arise in favour of a stranger to the contract, as a result of the non-performance.

That there is an obvious *petitio principii* involved in the argument seems evident. It does not by any means follow that, because a party to a contract can recover in tort only when the rights acquired by his contract are sufficient to enable him to maintain an action, a person who had nothing to do with the contract, but who subsequently finds himself damaged by what the parties to it have done or left undone, should be told that he has no remedy at all. To declare such a person unable to sue on the contract itself is one thing. It is quite another thing to argue that the principle by which a party to the contract, whatever the form of his action, can recover only where he could have recovered in

¹ *Collis v. Selden*, 1868, L. R. 3 C. P. 495, where a declaration was held demurrable which alleged that the defendant negligently hung a chandelier in a public-house, knowing that the plaintiff and others were likely to be therein and under the chandelier, and that the chandelier, unless properly hung, was likely to fall upon and injure them, and that the plaintiff being lawfully in the public-house, the chandelier fell upon and injured him. In *Elliott v. Hall*, 1888, 15 Q. B. D. 315, Grove J. (p. 321) said that he would have found some difficulty in arriving at the same conclusion as the Court came to in this case, but his remark, as the context shows, had no reference to the general principle stated in the text, but merely to the strictness with which the pleadings were construed.

² In *Robertson v. Fleming*, 1861, 4 Macq. 167; *Le Lièvre v. Gould* [1893] 1 Q. B. 493, C. A., overruling *Cann v. Willson*, 1888, 39 Ch. D. 39, a case of valuation of property with a view to raising money on it.

³ *Dickson v. Reuter's Telegraph Co.*, 1877, 2 C. P. D. 62; 3 C. P. D. 1; *Playford v. United Kingdom Telegraph Co.*, 1869, L. R. 4 Q. B. 706; *Feaver v. Montreal Telegraph Co.*, 1873, 23 Upper Can. C. P. 150. The American cases holding a telegraph company liable to a lessee are not based on any denial of the correctness of the general principle relied on in these cases, but merely override it for special reasons. See under IV, *infra*.

⁴ 1842, 10 M. & W. 109.

a suit directly upon the contract involves the corollary that a stranger to the contract, being unable to sue upon it, is precluded from redress altogether. In the one case, as the parties have chosen to define their relations by an agreement between themselves as to the subject-matter, it is reasonable enough to say that the agreement shall be the measure of their rights in regard to the same subject-matter. But the argument which makes this principle controlling with respect to a stranger to the contract, a person who has not assented to it and has no means of securing that it shall be properly carried out, seems to savour strongly of that scholasticism which has so often led the English courts to emphasise the shadow and ignore the substance of a juridical situation¹. It has been attempted to justify the accepted rule on broader grounds, but these will be more conveniently treated in another place (see XI, post).

The hardship of the rule is, in practice, a good deal mitigated by the various qualifications to which it is subject. These we shall now proceed to discuss.

IV.

The first two doctrines to be noticed are based on considerations which only affect a small proportion of the community.

(1) Any person who is injured by negligence in the performance of a public duty may recover damages from the persons subject to that duty, although the contract which led to his being in the situation which exposed him to the risk of injury from such negligence may have been entered into by other parties.

The familiar principle that, 'if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer²,' would, as respects duties which are

¹ As regards contracts for the express benefit of a third person, it might be an interesting inquiry whether the rule which prevents the beneficiary from suing in them (Pollock, on Contract, 6th ed., p. 201 et seq.) can, since the supremacy of equitable over legal principles has been declared, logically co-exist with the doctrine which enables a *cestui que* trust to enforce a contract which is essentially of that character. No contract between two parties amounting to a declaration of trust in favour of a stranger could ever be enforced by the latter if courts of equity admitted the force of the theory upon which, according to Crompton J. in *Tweedle v. Atkinson*, 1861, 1 B. & S. 393, the common-law rule is based, viz. that it would be a 'monstrous proposition to say that a person was a party to the contract for the purpose of suing upon it for his own advantage, but not a party to it for the purpose of being sued.' When observed through equitable lenses, this 'monstrosity' no longer presents an alarming aspect.

² Best C. J. in *Henly v. Mayor of Lyme Regis*, 5 Bing. 91 (p. 107). See also Lord Holt's remarks in *Lane v. Cotton*, 1 Ld. Raym. 646 (p. 654) as to the right of action against sheriffs.

public in the sense that they are undertaken by state functionaries, plainly involve the consequences indicated by the above proposition, if such duties could legitimately be referred to an antecedent contract. But as this element is wanting in such cases, the rule as to public duties concerns us in the present connexion only in so far as it relates to duties which are deemed public, because they arise out of the pursuit of a few occupations, the essential characteristic of which is that they imply a standing offer to perform certain services for any member of the community who may demand them. All the reported decisions seem to have reference to common carriers, whose liability for injury to persons or property after they have once been received on the transporting vehicle, is, as is well settled, independent of contract¹; but the rule would presumably be applied in an action brought against an innkeeper or a farrier². A notary-public, however, whose functions would seem naturally to place them in a similar category, is held not to be liable to a person whom his negligence may collaterally injure³. Whether any other occupations are public within the meaning of the rule is doubtful, as the books suggest no diagnostic mark by which they can be identified⁴.

It would seem that this doctrine as to public duties, though depending historically upon considerations of social expediency, might also be referred to the principle of an invitation implied from the nature of the occupations of which such duties are an incident⁵. But any speculations in this direction would be purely theoretical.

(2) Apothecaries or surgeons are liable for the unskilful treatment of their patients, although they were employed by other parties⁶.

The conceptions which underlie this rule would seem to be analogous in some respects to those which are apparent in (1), but the foundation actually assigned for it by the courts, is that, under

¹ *Winterbottom v. Wright*, 1842, 10 M. & W. 109; *Longmeid v. Holliday*, 1851, 6 Exch. 761; *Foulkes v. Metropolitan Railway Co.*, 1880, 5 C. P. D. 157; *Marshall v. York, &c. Railway Co.*, 1851, 11 C. B. 655; *Martin v. G. I. P. Railway Co.*, 1867, L. R. 3 Exch. 9; *Austin v. Great Western Railway Co.*, 1867, L. R. 2 Q. B. 442; *Dalyell v. Tyrer*, 1858, El. Bl. & El. 899.

² See the opinion of Lord Holt in *Lane v. Cotton*, ubi supra.

³ *Simpson v. Thomson*, 3 App. Cas. 279, at p. 239.

⁴ One of the grounds assigned in the United States for holding telegraph companies (see II, ante), is that by the statutes which authorize them to do business they are required to send messages for any one who may apply and, without any undue preference, are therefore virtually public agents or servants in the same sense as carriers; *Ellis v. American Telegraph Co.*, 95 Mass. 231. Another view is that they are actually common carriers; *Shearm. & Redf. on Negl.* (5th ed.) secs. 534, 535.

⁵ See such cases as *Marshall v. York, &c. Railway Co.*; *Austin v. Great Western Railway Co.*; and *Dalyell v. Tyrer*, cited in note 1 supra.

⁶ *Pippin v. Shephard*, 1822, 11 Price 400; *Gladwell v. Steggall*, 1839, 8 Scott 60, 5 Bing. N. C. 733.

any other doctrine, the defendant would virtually evade all liability, since, in the nature of the case, only the patient could prove actual damage—at all events where no loss of services is involved. This reason is interesting, as it dimly suggests the existence of a great principle, which, if admitted as a determinative factor in this class of cases, would plainly aid us greatly in putting the limits of responsibility upon a more rational basis. If such inconsistencies were not so common in English law, one might well feel some surprise that a doctor should be held responsible on this ground to a person not privy to the contract of employment, while, in other cases of professional services rendered under precisely similar conditions, the immunity of the defendant being equally inevitable unless the stranger to the contract for whose benefit it was made is permitted to sue, this consideration is not only not allowed the same weight, but, so far as the present writer is aware, has not even been discussed¹.

V.

The next two propositions exhibit the effect of doctrines which operate by carrying us altogether outside the characteristic principles of the law of negligence.

(3) The operation of the general rule that a person who creates a public nuisance is liable to any one who, being in the exercise of his lawful rights, sustains special damage therefrom, is not restricted by the fact that the nuisance resulted from the negligent performance of a contract with a third person².

This rule amounts simply to a statement that, if the actual consequence of a person's negligence is the creation of a nuisance, his liability is measured by the standards appropriate to that offence, and is therefore really determined without any regard to the question whether he was or was not negligent. The lower offence being, as it were, merged in the higher, it becomes quite immaterial whether the plaintiff was a stranger to the contract in the performance of which the nuisance was created. The circumstance that the material substances which constituted the injurious agency had passed out of the control of the negligent person at the time they inflicted the injury in suit also ceases to be defence under such circumstances, as is shown by the cases where a landlord is held liable for a nuisance which existed on the leased

¹ See II, ante.

² *Longmead v. Holliday*, 1851, 6 Exch. 761, where Parke B. instanced the case where a defective bridge is erected by a contractor on a public highway. To the same effect see *Collis v. Seiden*, 1868, L. R. 3 C. P. 495; *Winterbottom v. Wright*, 1842, 10 M. & W. 109.

premises when they were demised¹. The essential result of the rule, therefore, is that a negligent act which produces precisely the same physical conditions may render a person liable to a much wider range of persons in one case than in another, merely because the locality in which those conditions happen to be produced renders them a nuisance—a predicament which obviously cannot be justified on logical grounds.

(4) If *A*, in carrying a contract with *B*, is not merely negligent, but is also guilty of a fraudulent misrepresentation in respect to the subject-matter, a stranger to the contract, *C*, who is injured by his reliance upon that misrepresentation may recover damages from *A*, provided he falls within the category of those persons who are permitted to claim an indemnity for fraud from one with whom they have not directly dealt².

The application of the above doctrine to cases of this type seems to have been originally due to the desire of the judges who decided *Langridge v. Levy* to turn the flank of a troublesome problem. But before long its influence was manifested in a more positive form. In two cases³ where no such evasion of the fundamental issue was possible, these judges committed themselves without reservation to the doctrine that, where the nature of the facts is such as to exclude the conceptions of a public duty, a nuisance, and an inherently dangerous thing, fraud is not merely a possible ground, but the only ground upon which a stranger to a contract can recover damages for injuries traceable to its non-performance. Whether there can be a recovery under this doctrine is obviously a mere

¹ *Rosewell v. Prior*, Case 6, 2 Salk. 460, approved in *Cheetham v. Hampson*, 4 T. R. 318, per Buller J., p. 320; *Rich v. Basterfield*, 4 C. B. 783; *Gandy v. Jubber*, 5 B. & S. 78, 9 B. & S. 15.

² *Langridge v. Levy*, 1837, 2 M. & W. 519; 4 M. & W. (Exch. Ch.) 337. See the comments on this case by Alderson B., in *Winterbottom v. Wright*, 1842, 10 M. & W. 109 (p. 115); Parke B., in *Longmeid v. Holliday*, 1851, 6 Exch. 761; and Page Wood V.-C., in *Barry v. Croskey*, 1861, 1 John. & H. 1. It was also expressly stated in *Blakemore v. Bristol, &c. Railway Co.*, 1858, 8 El. & Bl. 1035 that wilful deceit was the ground of the decision (p. 1050).

³ *Winterbottom v. Wright*, 1842, 10 M. & W. 109; *Longmeid v. Holliday*, 1851, 6 Exch. 761. The opinion of Cave J., in *Heaven v. Pender*, 1883, 9 Q. B. D. 302, shows that he regarded the law as being settled in this sense, and although the actual judgment of the Queen's Bench Division was reversed by the Court of Appeal (11 Q. B. D. 503), the reversal had no reference to this theory. The comment of Brett M. R. on *Langridge v. Levy*, *supra*, that, 'taking the case to be decided on the ground of a fraudulent misrepresentation made hypothetically to the son, and acted upon by him, such a decision upon such a ground, in no way negatives the proposition that the action might have been supported on the ground of negligence without fraud' (*Heaven v. Pender*, L. R. 11 Q. B. D. 503, 512), seems to be shaped by a wish to minimize the effect of the case as one adverse to his own theory, to be noticed hereafter (see X, *post*). The later decisions by the same Court, as just cited, leave no doubt as to the intention of the judges to negative the plaintiff's right to recover, if his action had sounded in negligence alone. In *Collis v. Seiden*, 1868, L. R. 3 C. P. 495, all the judges conceded that the plaintiff might have recovered, if he had established fraud.

question of fact, Was the defendant guilty of a fraudulent representation, and was the plaintiff one of those persons who have a right to be indemnified for injuries caused by reliance on that representation? Here again, as in (3), the doctrine operates so as to make the defendant's negligence, though in a different way, an immaterial factor, except in those cases where it is of that reckless and wilful character which is assimilated to fraud for reasons fully explained in *Le Lièvre v. Gould*¹ and other cases.

VI.

The next doctrine to be noticed is one which is referable to the conception that specially stringent obligations are incurred by those who undertake to deal with material substances of certain classes.

(5) A person who uses or leaves about in such a way as to cause danger an instrument which is dangerous in itself is liable, independently of contract, to any one who is injured thereby.

This proposition closely follows the words of Romer J. in *Scholes v. Brook*², expressly approved by Lord Justice Bowen in *Le Lièvre v. Gould*¹. The doctrine which it embodies is apparently traceable to *Dixon v. Bell*³, where the injury was caused by the carelessness of the defendant's messenger in handling a loaded gun. Yet it seems very dubious whether the court which decided that case intended to do more than apply the principle that consummate care is obligatory in dealing with specially dangerous articles. The gist of the ruling is merely that the jury was justified in finding that the defendant did not take the precautions which a prudent man would have taken in a case where a young and thoughtless girl was sent to fetch a gun known to be loaded, the view of Lord Ellenborough being that the message to the person in charge of the weapon should at least have instructed him to draw the charge instead of the priming merely. The defendant being delinquent in this respect, the case becomes simply one of an agent's negligent execution of negligent instructions, the result of which would of course be to fasten a joint and several liability both upon the principal and upon the agent. In view of the subsequent development of the law on this subject, however, the correct construction of this case has become immaterial. It is now well settled that the range of responsibility, in respect to persons, is wider where the injurious agency is a thing 'dangerous

¹ [1893] 1 Q. B. 493.

² (1891) 63 L. T. N. S. 837.

³ (1816) 5 M. & S. 198, 17 R. R. 308.

in itself' or 'imminently dangerous' than where it does not come under that category. For aught that appears, the duty to deal with such things carefully seems, like the duty to avoid creating a nuisance, to be owed to all the world. The existence of a duty of this extent is not, at all events, negatived by any of the considerations which have been deemed fatal to the plaintiff's right of action in cases where the injurious agency was not of this character¹.

VII.

The most serious practical difficulty involved in the application of this doctrine is that no really adequate scientific test has ever been, or perhaps can be suggested, by which it can be determined whether an injurious agency does or does not belong to the category of things dangerous in themselves. As a sober matter of fact, considered without reference to the subtleties of legal construction, it is impossible to deny that, under certain circumstances, things which are normally quite safe to persons who handle or come into proximity to them change their character so completely as to be fraught with fully as much peril to such persons as the loaded gun in the *Dixon v. Bell*, supra—supposing, that is to say, that the dangerous conditions are, as in that case, not apparent. Shall we say then that, as has been declared by the New York Court of Appeals, the distinguishing characteristic of things which are imminently dangerous in themselves is that 'serious injury' to any persons using them is a natural and probable consequence of such use²? The acceptance of this test would necessitate the adoption of the theory laid down in the case cited, that a defective scaffold is a thing essentially dangerous, and the same reasoning would be equally applicable to many other industrial agencies and articles of commerce. Even in New York, however, the courts have shrunk from the conclusion to which their own logic points³,

¹ See *Longmeid v. Holliday*, 1851, 5 Exch. 761, per Parke B.; *Collis v. Selden*, 1868, L. R. 3 C. P. 495, per Willes J.; *Heaven v. Pender*, 1883, 11 Q. B. D. 503, per Cotton L. J.; *Caledonian Railway Co. v. Mulholland* [1898] A. C. at p. 218, per Lord Shand. See, however, the remarks of Baron Parke in *Langridge v. Levy*, 1837, 2 M. & W. 519, referred to in XI, post.

² *Devlin v. Smith*, 1882, 89 N. Y. 470.

³ *Losse v. Clute*, 1873, 51 N. Y. 494 (steam boiler not a dangerous instrument); *Loop v. Litchfield*, 1870, 42 N. Y. 351 (same decision as to fly-wheel which burst); *Burke v. De Castro*, 1877, 11 Hun. 354 (same decision as to defective hoisting-rope). It should be noted, however, that all these rulings preceded that in *Devlin v. Smith*, supra, and that the last one has been formally overruled in *Davies v. Felham*, 1892, 65 Hun. 573, affirmed without opinion in 146 N. Y. 363 (derrick for hoisting heavy stones). Other American courts seem to have uniformly refused to extend the liability of manufacturers and vendors on this ground beyond their immediate transferee. See *Ziemaun v. Kieckhefer*, 1895, 90 Wisconsin Rep. 497 (goods elevator); *Heizer v. Kingland, &c. Co.*, 1892, 110 Missouri Rep. 105 (threshing-machine); *Roddy v. Missouri Pacific Railway Co.*, 1891, 104 Missouri Rep. 234, 12 Law. Rep. Ann. 746

and such a theory would, of course, be quite irreconcilable with the series of English cases which begins with *Langridge v. Levy*¹. So far as the actual decisions go, it would seem that the rule as to things dangerous is in this country restricted to explosives², though it is not improbable that, if the question were actually presented, the judges might follow the American decisions which extend it to poisonous drugs³.

In its present shape, therefore, this rule seems to be of a very slender juridical value, its operation being confined to a small class of articles, the boundaries of which it is difficult, if not impossible, to fix on any logical grounds. The law of the subject, however, might be placed upon a more rational foundation, if cases of this type were referred, as they might well be, to the principles upon which a duty is in some cases predicated to impart information as to the dangerous qualities of substances which a person allows to pass out of his immediate control (see (8) post, and the cases cited in note 1, on the next page). On the one hand, it would be difficult to suggest any sound reason why the things which are regarded as 'dangerous in themselves' should not, for the purposes of legal liability, be held to be removed from that category by the proof that the person injured by them was aware of their true character. At all events it is clear that, under such circumstances, the maxim, *Volenti non fit iniuria*, would in most instances furnish a perfect protection to a defendant. On the other hand it seems undeniable that the courts, in establishing the doctrine imposing a more than usually stringent rule of responsibility upon those who deal with things of this kind, have been much influenced by the fact that the persons who will handle or come into proximity to them, after they have left the possession of the original transferor, are commonly, in the very nature of the case, ignorant of the dangers to which contact or proximity will expose them⁴.

(defective brakes; compare Lord Shand's opinion in the *Mulholland* case, note 1, p. 177, supra); *Goodlander Mill Co. v. Standard Oil Co.* (Circ. Ct. of App. 1894) 63 Fed. Rep. 400 (crude petroleum); *Bright v. Barnett*, 1894, 88 Wis. 299, 26 Law. Rep. Ann. 524 (defective scaffold); *Smith v. Onderdonk*, 1898, 25 Ont. App. 171 (defective locomotive).

¹ 2 M. & W. 219. See also the remarks of the judges in the cases cited in the notes to V, supra. Compare the remark of Lord Justice Bowen that the law of England 'does not consider that what a man writes on paper is like a gun or other dangerous instrument, and unless he intended to deceive, the law does not, in the absence of contract, hold him responsible for drawing his certificate carelessly.' *Le Lièvre v. Gould* [1893] 1 Q. B. 493 (p. 502), approving a dictum of Romer J. in *Scholes v. Brook*, 1891, 63 L. T. N. S. 837.

² See the cases cited in notes to VI, supra. Compare *Parry v. Smith*, 1879, 4 C. P. D. 325 (gas exploded); *Wellington v. Downer, &c. Co.*, 1870, 104 Mass. 64 (inflammable oil). ³ *Thomas v. Winchester*, 1852, 6 N. Y. 397; *Norton v. Sewall*, 1870, 106 Mass. 143.

⁴ In the American cases as to the sale of poisonous drugs—see the last note—much emphasis was laid on the fact that the plaintiff did not know, and had no reasonable means of knowing, that the drug was dangerous.

In some cases the special duty alleged to have been violated in regard to articles exceptionally dangerous was that of notifying the transferee of their properties¹, and although the language used by the judges seems to show that they viewed the injurious agency merely as things which required more care and caution than ordinary merchandise², rather than as things inherently dangerous in the sense with which we are now concerned, the analogy is sufficiently close to justify vouching these decisions in aid of our position, that a rule essentially identical in its practical results with that formulated in (5) above, and far more precise and rational, would be secured if the courts were simply to lay it down that one who transfers an exceptionally dangerous thing does not exercise the measure of care which the circumstances demand, unless, at the time of the transfer, he sees that the transferee is not under any misapprehension as to its properties, and that for an omission to discharge this duty he must respond in damages to any one, whether a remote transferee or not, whom the article injures while its properties remain undisclosed and undiscovered by the persons through whose hands it passes.

VIII.

A rule expressed in this form would place the liability for injuries caused by articles of this class on the same basis as that to which a person who has created a trap is subject. In fact it would seem that the only essential difference between a trap and a thing dangerous in itself is that the former expression refers to the condition of real property or of chattels affixed more or less permanently to real property, while the latter suggests a chattel of an essentially movable character, considered without any relation to locality³. That there is, apart from contractual relations, a duty incumbent on the owner of premises to inform persons who rightfully enter thereon of anything in the nature of a trap, is well

¹ *Brass v. Maitland*, 6 El. & Bl. 470; *Farrant v. Barnes*, 1862, 11 C. B. N. S. 553; *Lyell v. Ganga Dai*, 1875, Ind. L. R. 1 All. 60, where the persons injured were the servants of a carrier to whom the dangerous article had been delivered for transportation; *S. P. Standard Oil Co. v. Tierney*, 1891, 92 Kentucky Rep. 367; 14 Law. Rep. Ann. 677.

² See especially the opinion of Willes J. in *Farrant v. Barnes*, *supra*.

³ The following remark of Willes J. in *Collis v. Selden*, 1868, L. R. 3 C. P. 495 shows the close affinity between the two classes of cases: 'The chandelier is to be regarded as movable property, and the declaration should have shown either that it was a thing dangerous in itself, and likely to do damage, or that it was so hung as to be dangerous to persons frequenting the house. If that averment had been made and proved the case might fall within the class to which *Sullivan v. Waters*, 14 Jr. C. L. R. 460 belongs—as a trap to persons using or likely to use the way whether public or not.' For a similar blending of the two conceptions, see *O'Neil v. Everest* [1891] 61 L. J. Q. B. 451; *Devlin v. Smith*, 1882, 89 N. Y. 470.

settled¹, the theory being, as the word itself shows, that they may, in the absence of notification, be led by a feeling of false security to do something which, if they had understood the conditions, they would have left undone. As the situation thus predicated is obviously the same in all essential respects as that which arises when a person 'uses or leaves about' one of those things which are dangerous in themselves, it would seem that the liability in both instances might not unjustifiably be referred to the same considerations. In both classes of cases, it will be remarked, there are intimations more or less distinct of a comprehensive principle towards which the law may possibly be advancing, and which would create a right of action in favour of any member of the community who might be injured by handling or coming into proximity to property in which there is a latent danger, which the defendant, although he had become aware of its existence before the property had passed out of his custody, had failed to disclose to his immediate transferee.

IX.

In the next proposition the principle of an invitation emerges into prominence.

(6) If it is agreed, as an incident to a contract between *A* and *B*, for the performance of work on *A*'s premises, that *A* shall furnish certain appliances to facilitate the work, and it is contemplated that *Z* and the other persons employed by *B* to do the work will put these appliances to immediate use, *A* remains responsible, during a reasonable period after the appliances are placed at the disposal of *Z*'s master, for injuries caused by defects in the appliances which might have been discovered by a proper inspection.

This seems to be the actual effect of the much discussed case of *Heaven v. Pender*², though it is also cited as an authority for much wider propositions. Construed in this manner it simply means that the doctrine of *Indermaur v. Dames*³, which obliges the owner of premises to use care to keep them in safe condition for the use of

¹ *Membery v. Great Western Railway Co.*, 1889, 14 App. Cas. 179, per Lord Halsbury (p. 184). See also *Indermaur v. Dames*, 1866, L. R. 1 C. P. 274 (p. 289); *Smith v. London, &c. Docks Co.*, 1868, L. R. 3 C. P. 326. This duty is owed even to mere licensees. *Gautret v. Egerton*, 1867, L. R. 2 C. P. 375; *Bolch v. Smith*, 1862, 7 H. & N. 736.

² 11 Q. B. D. (C. A. 1883) 503, reversing the decision of the Queen's Bench Division (9 Q. B. D. 302), which turned upon the theory that the fact of the scaffold's having passed out of the defendant's control at the time of the accident was a conclusive bar to the action. Some years previously the same conclusion as to similar facts had been arrived at in Massachusetts. *Mulchey v. Methodist, &c. Soc.*, 1878, 125 Mass. 487.

³ L. R. 1 C. P. 274.

workmen who enter thereon to do something in which he is interested, even though they are not directly employed by him, is also the measure of his duty with regard to any chattels which he may furnish them to facilitate their work¹.

The decision shows that it is less easy to divest oneself of responsibility for the condition of a chattel where it is transferred by way of bailment than where it is transferred by sale². How long that responsibility remains with a bailor under the circumstances shown is a point left in uncertainty by the opinion of Cotton L.J., but from the stress which he lays on the fact that the appliance was furnished for 'immediate use,' and the language used by the Lords Justices in *Hopkins v. Great Eastern Railway Co.*³, it seems a legitimate inference, that the bailor would be held answerable until the bailee discovered that the appliance was defective or, failing such discovery, until such time as duty arose on his part, to subject it to a reasonably careful examination.

The essential grounds of distinction between *Heaven v. Pender* and the recent ruling in *Caledonian Railway Co. v. Mulholland*⁴ are not easy to define. It was held in the latter case that an arrangement by which one carrier *A*, after transporting goods to the point specified in his agreement with the shipper, allows a connecting carrier *B*, for his own convenience, to draw the vehicle with their loads to a place designated by the party to whom *B* has contracted to deliver the goods, does not create, in favour of the servants of *B* who will handle the vehicles, an obligation on *A*'s part to examine the vehicles in order to ascertain whether they are in a safe condition for the additional journey. If we could suppose that the controlling factor was that there was a gratuitous loan of the wagons, we should at once have an intelligible basis of differentiation, for, upon the principle noticed in *X*, post, the first carrier could not be held liable to the servants of the second except for such injuries as resulted from defects in the wagons which were actually known at the time of the transfer and not disclosed to the transferee. This view of the situation is not distinctly negatived by anything said in the opinions⁵, nor are the prior decisions

¹ See the comments of Lord Herschell in the case of *Mulholland v. Caledonian Railway Co.* [1898] A. C. 216.

² See the cases cited in II, note 2, p. 170, which all assume that, as regards strangers, the vendor's liability ceases when the transfer of the chattel is complete, unless he can be held for one of the special reasons afterwards commented on in section IV, et seq.

³ 1896, 60 J. P. 86.

⁴ [1898] A. C. 216.

⁵ Lord Shand considered that it was immaterial whether the vehicles were lent gratuitously or for a valuable consideration, as in either case the contract would be *res inter alios acta*, and could not be taken advantage of by strangers, such as the servants of the second carrier. But this remark seems to be a reaffirmation of the well-established doctrine that the servants of the second carrier could not sue on the contract of their master with the defendant (see II, ante).

establishing the principle in question even referred to; but it seems to supply the simplest solution of the issues raised by the evidence. Another possible standpoint would be to regard the two cases as illustrating the antithesis between the positions of one who is invited and of one who is not invited to use a chattel¹. The rule which this construction would suggest is that the bailor of chattels is liable, independently of contract, for injuries caused by discoverable defects in such chattels, where the injured person is one who used them on the bailor's premises to execute work in which the bailor had an interest, but not where such person was using them merely by the bailor's permission for the accomplishment of some object in which the bailor had no interest—especially where the loan involves the removal of the chattels from the bailor's premises. But as their Lordships have not thought fit to explain what they consider to be the true relation of this most unsatisfactory decision to those with which it comes in contact, both these theories as to its meaning must remain mere matters of surmise.

X.

In the doctrines so far noticed the consideration which, as was pointed out at the beginning of the article, furnishes the only test by which it can be determined on logical grounds whether the plaintiff was a person to whom the defendant owed a duty to use care is only inferentially involved. It is evident, however, that the general rule itself which we have been discussing and the rationale of some of the exceptions to it require us to assume the existence of a principle which may be formulated thus:—The mere fact that the defendant, if he had thought at all about the possible consequences of his negligence, must have seen that the dangerous conditions created by such negligence were likely to produce injury to persons coming within categories susceptible of ready ascertainment, will not render him liable for injuries which one of those persons may suffer by reason of the existence of those dangerous conditions². Some individual judges have undertaken to construct a theory of liability upon lines which would make this likelihood of injury to a particular person the controlling factor in every case³. But the actual decisions cut down the

¹ See *Pingree v. Leyland*, 1883, 135 Mass. 398.

² See *Winterbottom v. Wright*, 1842, 10 M. & W. 109; *Langridge v. Levy*, 1837, 2 M. & W. 519; *Collis v. Selden*, 1868, L. R. 3 C. P. 495; *Longmeid v. Holiday*, 1851, 6 Exch. 761; *Caledonian Railway Co. v. Mulholland* [1898] A. C. 216.

³ See the formulae suggested in XI, post, and the remarks of Chitty J. in *Cann v. Willson*, 1888, 39 Ch. D. 39. In *Cunnington v. Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392, Brett M. R. defended the decision in *Dickson v. Reuter's Telegraph Co.*, 2 C. P. D. 62, 3 C. P. D. 1, on the ground that it would be idle to argue that

above principle no further than appears in the two next propositions.

(7) Where a chattel is supplied for a specific purpose, whether by a bailment for a valuable consideration, or by a sale, a person who is injured by reason of its being unfit for that purpose may, although not privy to the transaction, recover damages from the transferor, if he was informed that such person was to use the chattel¹ or it is apparent that, in the nature of the case, he will use it².

(8) It seems that one who lends gratuitously a chattel to be used for a specific purpose is liable for injuries received by the bailee's servants, where it is in an unfit condition for use owing to defects which the lender was aware of and failed to disclose to the bailee³. But in any event the lender does not owe such servants the duty of examining the chattel in order to ascertain whether it is defective⁴.

The second of these propositions is not stated in positive terms, for the reason that the plaintiff in the three cases cited was, as

a telegraph company were bound to come to the conclusion that, whatever telegram they misreported, there must be an injury to the person to whom it was misreported. This comment is not very easy to reconcile with the learned judge's general statement of principles in *Heaven v. Pender*, 11 Q. B. D. 503, which he reiterated in *Cunnington's case* (see XI, post). That some damage should result is surely a natural consequence of an error in a message.

¹ *George v. Skirvington*, 1869, L. R. 5 Exch. 1, where a hairwash which proved deleterious was bought for the plaintiff by her husband. In the case next cited Lord Esher stated the effect of this case as follows: If a tradesman supplies an article under such circumstances that he must, or ought to have known, if he had thought about it, that the article would be used by other persons besides the purchaser, he owes a duty to those other persons, by reason of his knowledge that they will probably use it.

² *Hopkins v. Great Eastern Railway Co.*, 1896, 60 J. P. 86, C. A., where the plaintiff was the servant of one who had hired a coal-shoot from the defendants. All the judges argued upon the assumption that it was their duty to use care in seeing that the shoot was in good condition at the time it was transferred to the hirer, inasmuch as its use by the workmen must have been contemplated. Lord Esher expressly assimilates the situation to that presented in *George v. Skirvington*, supra. Kay L. J. thought the case came under the principle of *Heaven v. Pender* (see IX, ante), the effect of which he conceived to be 'that, where a dockowner supplies a shipowner with staging which, in the nature of things, will be used by third persons, there is a duty on the part of the person who supplies the staging towards such persons to see that the staging is, at the time it was supplied, fit for the purpose for which it was intended, but not that it shall remain in that condition.' This comment indicates clearly enough the standpoint of the court, though it seems to ascribe a much greater importance to the defendant's contemplation of the plaintiff's use of the scaffold, as a probable event, than the opinion of Cotton L.J. warrants. The statement recently hazarded by a member of the Ontario Court of Appeal in *Smith v. Onderdonk*, 1898, 25 Ont. App. 171, that the only grounds on which the bailor could be made liable in a case of this type were misrepresentation or fraudulent suppression, is clearly quite inconsistent not only with the *Hopkins* case which was not cited, but with *Heaven v. Pender* which was relied upon.

³ *Blakemore v. Bristol &c. Railway Co.*, 1858, 8 El. & Bl. 1035 J. followed in *MacCarthy v. Young*, 1861, 6 H. & N. 329, and *Coughlin v. Gillison* [1899] 1 Q. B. 145, C. A.

⁴ *Coughlin v. Gillison*, ubi cit.; *Caledonian Railway Co. v. Mulholland* [1898] A. C. 216, referred to in IX, ante, seems to be another case in which this principle, though not relied upon, is necessarily implied.

a matter of fact, denied recovery on the ground that the defendant had no knowledge of the defects in the chattels lent. But the reasoning in the *Blakemore* case seems to imply that he would have been allowed to maintain the action if he had been, instead of a mere volunteer, a servant regularly employed by the bailee. Supposing this to be a justifiable inference, the principle underlying this ruling and those in which it has been followed would be, that the duty to warn the bailee as to defects in the chattels lent enures to the benefit of any person besides the bailee, who is morally certain to use them. A servant of the bailee would obviously belong to this category, where the chattel lent was an industrial appliance which is either customarily operated by servants, or which must be so operated for the reason that the bailee cannot manage it without assistance.

It would seem from the cases cited under (7) and (8), that the courts, although they have not formulated such a principle in express terms, have proceeded on the theory that, as regards persons whom the transferor of a chattel is bound to take into his calculations as being likely to use it, the essential difference between the obligations resulting from a gratuitous transfer, and from a transfer upon valuable consideration, is that in the former case his duty is limited to informing the transferee as to defects of which he has actual knowledge, while in the latter case his duty extends to examining the chattel with reasonable care before it leaves his possession.

It will be observed that the facts presented in the cases under this head, which involve a bailment, are closely analogous to those in which an implied invitation is treated as the controlling factor. But the principle upon which they are based is of wider scope than that of an invitation, which, as the authorities now stand, can scarcely be considered to cover more than the predicaments which imply either actual control or, as in *Heaven v. Pender*, supra, what may be termed the constructive control which is supposed to have continued for a period, varying in length according to circumstances, after the injurious agency has left the possession of the party charged with culpability.

XI.

We must now consider the attempts which have been made to introduce some order into the chaos which, as the foregoing digest of the decisions only too clearly shows, has resulted from undertaking to solve, by means of a number of isolated doctrines, between

which there is little or no correlation, a class of problems which are identical as respects one essential element.

In one of the earliest of the cases, upon which we have commented above, plaintiff's counsel endeavoured to procure the acceptance of the doctrine that, wherever a duty is imposed by contract or otherwise, and that duty is violated, any one who is injured by such violation may recover damages from the wrong-doer¹. Parke B. declined to discuss this argument, preferring to rest his decision on the grounds already mentioned (*V. ante*), but said that he would hesitate to concede the correctness of the proposed doctrine even in the case of things dangerous in themselves. The same argument was again rejected in *Winterbottom v. Wright*², and is impliedly negatived in all the later decisions cited above³. For practical lawyers, therefore, the suggested theory possesses a mere historical interest, representing one of the abortive endeavours which have at various times been made to broaden and rationalize the foundations of our law. Yet, if the right of contracting is a form of property, which will scarcely be denied⁴, the rejected doctrine is clearly nothing more than an application, in a liberal sense, of the maxim *Sic utere tuo, ut alienum non laedas*, and upon this basis it would find a place in any scientific system of jurisprudence⁵.

A theory of responsibility which has a much better chance of ultimately obtaining a foothold in our law is that formulated in the following well-known passage of Lord Esher's opinion in *Heaven v. Pender*⁶ :—

'Whenever one person is by circumstances placed in such a position with regard to another that every one of ordinary sense who did think would at once recognize that, if he did not use ordinary care and skill in his own conduct with regard to those circumstances, he would cause danger of injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger.'

In another case, decided a few months later, we find the learned judge reiterating the same theory in somewhat different terms :—

'Wherever the circumstances disclosed are such that, if the

¹ *Langridge v. Levy*, 1837, 2 M. & W. 519.

² 1842, 10 M. & W. 109.

³ See also *Alton v. Midland Railway Co.*, 1865, 19 C. B. N. S. 213. In the unqualified form in which it was couched, it obviously could not prevail even as to statutory duties since the decision in *Atkinson v. Newcastle, &c. Works*, 2 Ex. D. 44.

⁴ [Many English lawyers would certainly deny it.—Ed.]

⁵ It is by reasoning on the lines here suggested that an American writer of repute has undertaken to justify the decisions by the courts of the United States to the effect that a telegraph company owes a duty to the receiver of a telegram. Bigelow, *Leading Cases on Torts*, p. 626.

⁶ 1883, 11 Q. B. D. 503.

person charged with negligence thought of what he was about to do, or to omit to do, he must see that, unless he used reasonable care, there must be at least a great probability of injury to the person charging negligence against him, either as to his person or his property, then there is a duty shown to use reasonable care¹.

In the same case Lord Justice Fry furnished a third formulary:—

‘One may lay down with some safety that, where a man without contract does something to another man, and the first man knows that, if he does the act negligently, that negligence will in all probability produce injury to the person or property of the second man, there the first man owes the second a duty to do the act without negligence.’

These propositions, it will be observed, bring out with reasonable clearness the fundamental fact noticed at the beginning of this article, that the likelihood of a certain person's being injured is as much within the scope of the natural and probable consequences for which a negligent person is liable, as the likelihood that the physical event which constitutes the injury will occur. At present, however, it must be admitted that, logically unexceptionable as they appear to be, the opinion of the majority of the Court of Appeal in *Heaven v. Pender*, supra, as well as the reasoning in the case of *Caledonian Railway Co. v. Mulholland*², must be taken to show that they are not yet accepted as correct statements of the law. That they could not be accepted without overruling at least a part of the cases cited above is manifest. In subsequent cases even Lord Esher seems somewhat to restrict the scope of his doctrine by declaring that the duty upon the breach of which an action for negligence is founded is that a man is bound not to do anything negligently so as to hurt a person near him, and that the whole duty arises from the knowledge of that proximity³. Whether he really intended to recede from his original views is hard to say; but evidently it would be necessary to strain this later language very considerably to make it cover the cases which are really the most troublesome of all, viz. those in which the injurious agency was not under the defendant's control at the time of the accident.

XII.

Our article may be appropriately concluded by some brief criticisms on the *argumenta ab inconvenienti* by which certain judges

¹ *Cunnington v. Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392.

² [1898] A. C. 216.

³ *Thomas v. Quartermaine*, 1887, 18 Q. B. D. 685 (p. 688); *Le Lievre v. Gould* [1893] 1 Q. B. 491. Compare also the language used by Smith L.J. in the latter case (p. 504).

have undertaken to justify the present limitations of the range of responsibility.

In that class of cases in which a person loses a benefit intended for him, owing to the negligence of a professional man in carrying out the instructions of another party, the doctrine that the loser of the benefit cannot claim damages for such negligence has been defended on the ground that to allow such an action would lead to the result that a disappointed legatee might sue the testator's solicitor for negligence in not causing the will to be duly signed and attested, though he might be an entire stranger both to the solicitor and the testator¹. Here, under the circumstances supposed, the solicitor could not be called to account by his employer, who, by hypothesis, would be dead when the delinquency bore its fruits, nor by the representatives of the decedent, who would obviously be profited rather than damaged by the negligence which invalidated the legacy. The argument, therefore, was simply an attempt to justify the refusal of a right of action to the only person who could show actual damage by adducing a similar case in which the professional man would also escape scot-free if he could not be sued by the person injured. Surely a very neat and convincing piece of logic! The reasoning here employed is, as we have already pointed out, wholly inconsistent with that which is used to sustain the right of a patient to sue a medical man not retained by him. (See IV (2) ante.)

In another class of cases great reliance has been placed upon an argument of a somewhat similar stamp, viz. that it would be unjust, after a contractor for the supply of some article of commerce has done everything to the satisfaction of his employer, to allow the transaction to be reopened by one not privy to it. The credit, such as it is, of first promulgating this theory, is apparently due to the judge whose fertile imagination clinched the doctrine of the servant's assumption of the risks of his employment by reasoning of a like sort². In *Winterbottom v. Wright*³, where it was held that a manufacturer who had furnished the Postmaster General with a coach for which another person supplied the drivers and horses was not liable to one of those drivers for an injury caused by the breaking of a defective axle, Lord Abinger was strongly influenced by these considerations: 'If the plaintiff can sue, every passenger, or even any person passing along the road, who was injured by the upsetting of the coach, might bring a similar action. Unless we confine the operation of such contracts

¹ *Robertson v. Fleming*, 1861, 4 Macq. H. L. 167.

² See *Priestley v. Fowler*, 1837, 3 M. & W. 1.

³ 1842, 10 M. & W. 109.

as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue.' The same kind of language also makes its appearance in later cases¹.

The argument seems to amount, broadly speaking, to this: that to compel a negligent workman to indemnify each and every person who might be injured by his negligence would be inexpedient and unjust, for the reason that it would widen unduly the circle of liability, thus producing excessive intricacy of actions, and creating conditions of responsibility which would deter prudent men from engaging in certain occupations. As to the first of the results here held out *in terrorem*, it seems sufficient to say that, even if the practical difficulties involved in the task of fixing responsibility upon the proper party were in some cases as grave as the argument assumes, it does not by any means follow that the courts should decline the task altogether. With regard to the suggested discouragement of enterprise, the ground might be taken reasonably enough that, until the matter has been brought to the test of experience, the burden of proving that this would be the consequence of widening the circle of responsibility, lies upon those who make the assertion, and that this burden is not discharged by the mere *ipse dixit* of any judge, however eminent he may be. Indeed one might go still further and say that, as this argument emanated originally from a judge whose arguments of a very similar type, in support of the doctrine of common employment, have been signally confuted by the logic of events since the abolition of that doctrine by the Employers' Liability Act of 1880, his reasoning is rather more likely than not to be unsound. The plain truth of course is that the opinion of a lawyer upon the probable operation of economic forces is of just as great or as little value as that of a layman of equal intelligence and with the same knowledge of the subject.

Nor is this all. It is, we think, not by any means difficult to show that the inconveniences to which it is declared that manufacturers and vendors of chattels would be subjected by holding them liable to strangers are much less serious than the courts would have us suppose. To read the passages in which judges have expatiated upon the withering effects of an extension of liability one would imagine that a single defect in a chattel might be pregnant with peril to a limitless number of people. Yet a little consideration will show that a long succession of accidents from any particular imperfection in the same article, though theoretically possible, would be quite inconsistent with the ordinary experience

¹ It will be sufficient to instance the remarks of Willes J. in *Collis v. Selden*, 1868, L. R. 3 C. P. 495.

of every-day life. Such a defect almost invariably exhausts its potential capacity for mischief when it has produced its first injury after the article has left the possession of the manufacturer or seller; for, in the normal course of business, the occurrence of a single accident suggests and brings about the disuse of the article or its restoration to a state of good repair. And in any event, after the existence of the defect has been revealed by the infliction of an injury or otherwise, the responsibility for the future condition of the article will, upon undisputed principles of legal causation, be shifted to the person in possession. There is no apparent reason, therefore, why the responsibility should not in any event remain with the manufacturer or seller until the defect has been actually brought to light by an accident, or until a duty falls on the person in possession to examine the article for the purpose of ascertaining whether its quality has deteriorated, and there is at least one good reason why this doctrine should prevail. Evidently the present rule will not infrequently so operate that no one at all can be brought to account for injuries caused by a dangerously defective chattel—a situation much more ‘outrageous’ than any of those which have suggested themselves to Lord Abinger and other judges. Such a case arises where the inspection which would have led to a disclosure of the defect is one which it was the duty of the seller to make, but which it would be unreasonable to require the purchaser to make, as where the defect could not have been discovered without special skill and knowledge, which the seller possesses and which the purchaser usually lacks. Transactions presenting this feature occur whenever a manufacturer sells machinery or a chemist sells drugs. As a general rule, the customers would be justified in assuming that the articles bought are in such a condition that they may be safely used, although they may have latent defects of which the vendors should have been aware¹. Hence, if a stranger to the transaction, such as a servant of the purchaser, suffers injury from a defect in the machinery, the effect of the present rule will often be that he cannot claim an indemnity from the manufacturer or vendor because there is no contract between them, nor from the purchaser because he has not been wanting in due care. The injustice of denying a remedy under these circumstances against the only person who has been

¹ See the comments of Brett M. R. in *Cunnington v. Great Northern Railway Co.*, 1883, 49 L. T. N. S. 392, on *George v. Skivington*, 1869, L. R. 5 Exch. 1. The doctrine stated in the text is clearly a necessary corollary from the principles which define the relations between an independent contractor and his employer, and is so treated by the American courts in the cases which have established the right of a purchaser to rely to a very great extent on the quality of an article bought from a reputable manufacturer. See *Carlson v. Phoenix Bridge Co.*, 1892, 132 N. Y. 273; *Reynolds v. Merchants Woolen Co.*, 1897, 168 Mass. 501.

guilty of negligence is not disguised by the use of the convenient expression, *damnum absque iniuria*¹. The supposed situation, in fact, whatever gratification it may afford to a connoisseur of logical dilemmas, is simply shocking to common sense. That modern judges, with a few exceptions, should still refuse to admit that there is anything incongruous or unsatisfactory in the doctrines which lead up to it, shows how far even the most robust intellects may, under our system of case law, be carried away from a scientific theory of responsibility by following precedents which, when analysed, seem to rest on no more solid basis than doubtful inferences from the mere technicalities of pleading and equally doubtful considerations of social and economic expediency.

C. B. LABATT.

[We are unable to discover in Mr. Labatt's ingenious but, in our opinion, paradoxical argument, any recognition of the distinction between misfeasance and non-feasance, or the difference between liability for one's own acts (including acts of one's servants in the course of their employment) and the liability of an insurer. Neither does Mr. Labatt allege that civilized systems other than the Common Law—the law of the Province of Quebec, for instance—are more favourable to his own view. We have not heard of the decision in *Caledonian Railway Co. v. Mulholland*—where, by the way, English authorities were not binding, and could have only a persuasive authority on their merits—being disapproved by any one before Mr. Labatt. No doubt it was once a current view that if *A* has made a contract with *B*, this excludes or limits any liability of *A* to *Z*, apart from contract, arising out of an act which as between *A* and *B* is a breach of the contract. Such a view is no longer tenable. But Mr. Labatt seems to hold that *A* is to be liable to *Z* merely because *A* has broken his contract with *B* and *Z* has suffered consequential damage. This, it is submitted, goes as much too far the other way. The question between *A* and *Z* is a question of a general duty of care and caution, which duty arises from *A*'s acts and position with regard to *Z*, not from *A*'s promises to *B*. Contractual duty, if any, may be co-extensive with independent duties, but is no measure of them.—ED.]

¹ See the opinion of Rolfe B. in *Winterbottom v. Wright*, 1842, 10 M. & W. 109.

A HUSBAND'S LIABILITY FOR HIS WIFE'S TORTS, AND THE MARRIED WOMEN'S PROPERTY ACT.

IN the late case of *Earle v. Kingscote*¹, in which a common law action of deceit was brought against a husband and wife to recover damages for a false representation made by the wife, it was agreed between the parties², in accordance with the case of *Seroka v. Kattenburg*³, that the husband's liability was not affected by the Married Women's Property Acts. It is submitted, however, that the decision in *Seroka v. Kattenburg*, that a husband may still be sued jointly with his wife in respect of wrongs done by her, is of doubtful authority and should be reconsidered. The ground taken in giving judgment in that case was that the Married Women's Property Act, 1882, contains no provision expressly removing a husband's liability to be sued jointly with his wife in respect of her torts, and therefore such liability remains⁴. But when we consider the real nature of a husband's liability in respect of his wife's torts at common law, there seems to be good reason for doubting the correctness of this conclusion. At common law, a wife was not under an incapacity in respect of wrong like her incapacity in respect of contract. She had the obvious human capacity of doing harm to others; and she was perfectly competent at law to incur an obligation *ex delicto*. And if she incurred such an obligation, it attached properly upon herself, and not upon her husband. For a tort committed by a wife was, and is, no *cause of action* against her husband: but it was, and is, a good *cause of action* against herself⁵. In consequence, however, of the general common law rule, that a married woman could not sue or be sued by herself alone, it was necessary, on suing a wife for her tort, to join her husband as co-defendant⁶. If the action were successful, judgment was given against the husband and wife *jointly*. The

¹ [1900] 1 Ch. 303.

² See [1900] 1 Ch. 205.

³ 17 Q. B. D. 177.

⁴ The Act provides (sect. 1 (2)) that a married woman shall be capable of suing or being sued in tort in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her. The judges (Mathew and A. L. Smith) held that these words do not discharge the husband from his old liability, but were intended to give to a person injured by a wife the option of suing her and her husband together or her alone.

⁵ See *Keyworth v. Hill*, 3 B. & A. 685; *Vine v. Saunders*, 4 Bing. N. C. 96; *Catterall v. Kenyon*, 3 Q. B. 310; *Capel v. Porcell*, 17 C. B. N. S. 743.

⁶ Bac. Abr., tit. Baron and Feme (L); *Hend v. Briscoe*, 5 C. & P. 484; 38 R. R. 841; 2 L. J. N. S., C. P. 101.

wife was personally liable upon such a judgment just as much as the husband; and before the abolition of imprisonment for debt, she might have been taken in execution and imprisoned to satisfy such a judgment, whether her husband were also taken in execution or not¹. And the wife's liability for her torts continued after her husband's death or the dissolution of the marriage, when she might be sued alone in respect of them. But the husband's liability for his wife's torts was a mere consequence of his liability to be sued jointly with her. If the wife died or the marriage were dissolved, the husband could no longer be sued for his wife's tort, and any action commenced during the marriage upon such a cause of action at once abated. So that a husband sued jointly with his wife for her tort escaped all liability if his wife died before judgment². And the like law prevailed in the case of a tort suffered by a wife. It was a good cause of action by the wife; but at common law her husband must have joined in suing in respect thereof during the coverture. If he died, she could sue alone for a wrong done to her during coverture; but a joint action brought for such a wrong during the marriage abated on her death³. That a wrong done to a married woman is a good cause of action by her was recognized by the Court of Appeal in *Weldon v. Winslow*⁴, where it was decided that the Married Women's Property Act, 1882, enabled a married woman to sue alone in respect of a wrong done to her before the Act came into operation, notwithstanding that before the Act husband and wife must have joined in suing for such a wrong, and the husband had the right to reduce into his own possession any damages awarded in the action. In that case the Court held that the effect of the Act was (in the words of Bowen L.J.⁵) 'to destroy the disability of the wife for the purpose of procedure.' But, as we have seen, the liability of a husband for wrongs done by his wife was a mere consequence of her incapacity to sue or be sued alone⁶. If, therefore, the effect of the Act be to destroy this disability of the wife, would it not appear to follow that a husband should no longer be liable to be sued for his wife's torts, which give rise to no cause of action against him, and for which she can now be sued alone?

¹ *Finch v. Duddin*, 2 Stra. 1237; *Ferguson v. Clayworth*, 6 Q. B. 269; *Newton v. Boodle*, 9 Q. B. 948; *Newton v. Boodle*, 4 C. B. 359; *Larkin v. Marshall*, 4 Ex. 804. The court would exercise its discretion in discharging the wife, if she had no separate property, but otherwise not; *Edwards v. Martyn*, 17 Q. B. 693; *Ioens v. Butler*, 7 E. & B. 159; *Ex parte Butler*, *Jay v. Amphlett*, 1 H. & C. 637.

² See *Hardres*, 161; *Baron v. Berkley*, 1 Lut. 670; *Capel v. Powell*, 17 C. B. N. S. 743.

³ See *Bac. Abr.*, *Baron and Feme* (K), and the cases cited above, p. 191.

⁴ 13 Q. B. D. 784.

⁵ 13 Q. B. D. 788.

⁶ This point is made especially clear in *Capel v. Powell*, 17 C. B. N. S. 743, where it was held that, after a marriage had been dissolved by divorce, the husband was no longer liable to be sued in respect of wrongs done by the wife during the coverture.

It was decided by the House of Lords in the case of *Companhia de Moçambique v. British South Africa Co.*¹ that the true test of obtaining relief under the present practice is whether the suitor has a good cause of action against the person sued. Can it therefore be good law that a man injured by a wife shall successfully sue her husband jointly with her, when he has no cause of action against the husband, and when the rule of procedure no longer exists which made the husband a necessary party to actions against the wife?

It should also be noted that counsel for the successful party in *Seroka v. Kattenburg* pressed the judges with the erroneous *dictum* of Jessel M.R. in *Wainford v. Heyl*². In that case the Court refused to order a married woman's separate estate to be applied in making good a loss to the plaintiff caused by a breach of trust on her part. This was doubtless a sound decision; but in the course of his judgment the late learned judge remarked: 'One cannot conceive why she should be made liable for general torts in reference to trusts any more than for general torts at law. Strictly speaking, she cannot commit torts; they are torts of her husband, and therefore she creates as against her husband a liability³.' This was a correct statement of the doctrines of equity; for in equity the husband of a female trustee was regarded as the legal owner of the trust property, and it was considered that in respect of a breach of trust or *devastavit* the acts of the wife were the acts of the husband, who was liable to be decreed to make satisfaction therefor in proceedings in equity brought against him *alone*, either during the coverture or *after its termination*⁴; so that in equity the wife's breach of trust was a good cause of action against the husband. But, at common law, as appears from the authorities cited above, wrongs done by a wife are, and always have been, a good cause of action against her, but not against her husband, who is not liable when the coverture is at an end. So that the *dictum* above quoted appears to have been an incautious utterance so far as it deals with liability for a married woman's torts *at law*.

It is impossible to close this article without remarking on the perversely narrow spirit in which the Married Women's Property Act, 1882 has been interpreted. The draftsmanship of the Act certainly cannot be commended: but its authors have good reason to complain of some of the glosses which have been placed upon it. If the Act be read with an open mind and with reference to the rules of the common law relating to husband and wife, it seems reasonably plain that the Act was intended to confer on wives a legal

¹ [1893] A. C. 602.

² L. R. 20 Eq. 324.

³ L. R. 20 Eq. 325.

⁴ See *Paget v. Read*, 1 Vern. 143; *Adair v. Shaw*, 1 Sch. & Lef. 243; *Kingham v. Lea*, 15 Sim. 396, 401; *Smith v. Smith*, 21 Beav. 385; *Charlton v. Coombes*, 4 Giff. 382.

capacity equal to that of single women in the way of acquiring, holding, and disposing of property, and a like power of making contracts, with the proviso that their obligations so undertaken should be discharged, if exacted by law, out of their separate property; that is, out of their own and not their husband's property¹. The judges, however, seem to have been seized with the notion that the scheme of the statute was merely to invest married women with the like powers, though cognizable at common law, of holding, alienating, and making engagements on the faith of their separate property as they previously enjoyed in equity in respect of their separate estate. Hence arose the absurd doctrine, now removed by statute², that a wife should not be liable under the Act in respect of any contract made by her, unless it were proved that she had some separate property, free from restraint on anticipation, at the time when she made the contract³. Hence arose the mischievous decision that a wife is not personally liable on her contracts, and cannot, therefore, be imprisoned under the Debtors Act, 1869, for failure to pay her debts, although she has had the means to pay them⁴. If the Courts had been guided in the construction of the Act by the general law of contract, if they had discarded the analogy of wives' general engagements in equity, and if they had firmly maintained, in the case of married women, the principle that the essence of contract is the creation, quite irrespective of the contracting party's present means, of a personal obligation to perform a promise⁵, there would hardly have been need for an amending Act to

¹ See sect. 1 (1, 2).

² Stat. 56 & 57 Vict. c. 63.

³ *Palliser v. Gurney*, 19 Q. B. D. 519; *Leak v. Driffeld*, 24 Q. B. D. 98; *Pelton v. Harrison* [1891] 2 Q. B. 422.

⁴ *Scott v. Morley*, 20 Q. B. D. 120. The Act provides (sect. 1 (2)) that a married woman shall be capable of entering into and *making herself liable* in respect of and to the extent of her separate property on any contract, and may be sued thereon alone, and any damages or costs so *recovered against her* shall be payable out of her separate property, and not otherwise. The court held that the last words so controlled the others that, although a married woman's contract may result in a debt due from her, she cannot incur the same personal liability to pay as is incumbent on a man; and that she was free from imprisonment under sect. 5 of the Debtors Act, partly on the ground that such imprisonment was a substitute for execution on a judgment by *ca. sa.* It is submitted that it was quite open to them to have decided the other way; and that no more, if so much violence would have been done to the letter of the Act in holding that the controlling words were those which enabled the wife to make *herself* liable and judgment to be recovered against *her*, and that the concluding words were only intended to relieve the husband from liability. Since imprisonment for debt has been abolished a man is only liable on his contract in respect of and to the extent of his property; and it is now held that imprisonment under sect. 5 of the Debtors Act is merely punitive, and is not an execution of the judgment; *Stonor v. Fourie*, 13 App. Cas. 20; *Re Watson* [1893] 1 Q. B. 21.

⁵ The very librettist has displayed a sounder instinct; witness the case of *La Dame Blanche*, where a vendor having unwisely put up property for sale without stipulating for payment of a deposit, finds his offer accepted and himself bound by contract to an avowedly penniless officer.

make wives' contracts enforceable as against property coming to them after the coverture has determined¹.

To the same narrow spirit is attributable the maintenance since the Act of the rule of construction that, on a gift of any property to a husband and wife and a third person either jointly or in common, the husband and wife take only one half share between them²; a rule which is entirely at variance with the common sense of laymen, and which would obviously cease to exist if the wife were really endowed with what the Act purports to give her, viz. the *same capacity* of acquiring and holding property as a single woman has. Another instance is the decision³, now cured by statute⁴, that a wife's will made during coverture was not effectual to pass property acquired by her after her husband's death. And the same spirit is responsible for the inconvenient decision⁵ that the Act only confers on a married woman a special and peculiar capacity to hold and dispose of property which is hers beneficially, and does not enable her to hold and alienate property as her separate property at law, if in equity she be entitled on trust for another. It is submitted that in every one of these cases the difficulties certainly raised by the wording of the Act might well have received a different solution; and that the opposite construction to that which has received judicial sanction might have been adopted without doing violence to the letter of the Act, and would have been more reasonable, more consistent with general legal principles, and more convenient.

T. CYPRIAN WILLIAMS.

¹ Stat. 56 & 57 Vict. c. 63, s. 1, passed to correct the effect of the cases cited above, p. 194, n. 3, and *Stogdon v. Lee* [1891] 1 Q. B. 661. See *Safflaw v. Welch* [1899] 2 Q. B.

419.

² *Re March*, 27 Ch. D. 166; *Re Jupp*, 39 Ch. D. 148.

³ *Re Price*, 28 Ch. D. 709; *Re Ouno*, 43 Ch. D. 12.

⁴ 56 & 57 Vict. c. 63, s. 3.

⁵ *Re Harkness and Allcock's Contract* [1896] 2 Ch. 358.

THE COMPLETE LEGISLATOR: A SOCRATIC DIALOGUE.

Cebes.

WELL met, Socrates! about what are you philosophizing with your head in Nephelococcygia?

Socrates. I am considering, Cebes, whether you and Alcibiades and other brilliant young men are real things or only shadows.

Ceb. Let us hear your conclusion by all means, Socrates, on so important a matter.

Socr. First tell me where you and your friends are going, so that we may see if our ways lie together.

Ceb. We are all going to sup with Ctesias—him yonder with the first down on his cheek—who is to propose a resolution in the Council to-morrow.

Socr. A resolution! about what, Cebes?

Ceb. Ctesias is of opinion that women ought to be trained in athletic exercises, equally with the men: for why, he says, should they, having bodies like men, and needing health as much as men, be confined always in the women's apartments?

Socr. This is a bold proposal, Cebes. Will the Athenian women be thankful, think you, to Ctesias for the innovation?

Ceb. Perhaps not, Socrates, but what the legislator has to consider is, I suppose, the benefit of those legislated for, not their likings or dislikings.

Socr. So that what we have to consider in this case is whether it is beneficial or not for women to exercise in public, and to run and jump, and throw the discus just like men. Then how shall we be able to find this out?

Ceb. In my opinion, Socrates, we can only find out what is beneficial to women in this respect by trying the experiment, and seeing whether the running in the stadium, and the boxing and charioteering will make them taller and stronger and more beautiful—better models for the sculptor—than those who live in an effeminate way in half-darkened rooms, and spend their time in gossiping about trifles, and eating sweet cakes and other unwholesome things.

Socr. You have sketched a pleasant picture, Cebes, of the woman of the future . . . but what if you and Ctesias are being carried

away by the ardour of your imagination, and instead of our women being made divinely tall and healthy and beautiful, this fisticuffing and wrestling and other rough exercises should mar all the grace and charm which they now possess, and should make them rude and independent and mannish, and disdainful of love and of the tendernesses of life? Will you not have committed a most disastrous blunder, and one, too, not easily repaired, if instead of transforming our women into so many Atalantas you should change them into Amazons or Medusas?

Ceb. There certainly seems a danger of our doing so, Socrates.

Socr. May it not be well then, Cebes, that before Ctesias carries his resolution he should find out what other Greek states, and perhaps some of the barbarians, who are not without intelligence, have done in this matter, and how far their attempts have been successful?

Ceb. I am inclined to think you are right, Socrates, for the best things are those which are most easily ruined, and woman is the fairest of created things, as one of our orators has said.

Socr. Then if we are to inquire what other states do in this matter, are there not the Lacedaemonians, who have this very institution which Ctesias is for introducing? For the Laconian damsels, before marriage, are accustomed not only to march in the religious processions, and to sing and dance at the festivals, but to contend with one another in running and wrestling and boxing, and that, too, wearing only a *σχιστὸς χιτὼν*, and there are those who tell us that this training, though it gives them a fine shape and complexion, makes them imperious and unruly and lax in their conduct after they are married, and not even brave when they ought to be, as they showed when the Thebans marched into Lacedaemonia; though I know Xenophon, who is enamoured of everything Laconian, will not agree with us here. Then ought not Ctesias to study how these things are, Cebes, before he attempts to legislate?

Ceb. Why certainly, Socrates.

Socr. And will not this be the sound principle for the legislator who would make useful laws, and laws which will last to follow on all occasions, so that he may benefit by the experience of others? For instance, Phocion was lately telling me that the Cretans, who you know are great archers, have invented a bow, made of a certain kind of wood there, which will shoot half as far again as the ordinary bow. Then what should we say of the general who, having heard of such a bow, neglected to find out how it was made so that he might arm his own soldiers with it in case of war?

Ceb. We should surely say it was nothing short of madness, Socrates, if indeed the Cretans told Phocion the truth.

Socr. Or if an Egyptian pharmakopolist—and you know they are very clever at such things—had found out a medicine which would keep a man in health, and enable him to endure great fatigue for a long time together, and almost to grow young again; what should we say to the physician who made no inquiries about so precious a drug?

Ceb. We should surely be right, if we were his patients, in being indignant with him, Socrates.

Socr. Then what shall we say of the legislator, who pays no attention to the discoveries which legislators in other states have made by their experiments—discoveries more valuable than any kind of drug or weapon—but goes blundering on in his ignorance? Will not such an one seem as foolish as a man who should think he could walk better on a dark night by a solitary lantern than by the light of all the torches of the Panathenaic procession?

Ceb. Surely! yes, Socrates.

Socr. Nay, will not the conduct of such an one be worse than foolish, seeing that every bad law, as one of our wisest men has said, is little short of a crime, bringing loss or misery or disease on the people?

Ceb. I can well understand this, Socrates.

Socr. So that such a legislator—a legislator, I mean, who neglects all inquiry of the sort we are speaking about—is likely, is he not, to do more harm than good by his legislation; and we may justly call him a pseudo-legislator, and hardly better than a kind of charlatan?

Ceb. I am very much disposed to be of your opinion, Socrates, and now I think of it, I seem to have read somewhere that Solon, before he drew up his celebrated Constitution, visited a number of countries both Greek and barbarian.

Socr. I have read the same, Cebes, and Solon seems to me to have shown his wisdom in nothing more than in doing as you say. For consider it in this way. Are not all communities—being composed of men, women, and children with the same natures and the same needs—necessarily very much alike?

Ceb. Very much alike, Socrates.

Socr. And do not such communities aim at the same end, that is to say, τὸ εὖ ζῆν? And will they not, that they may attain this end, want to buy and sell, and get gain and to marry—the women especially, that they may have husbands to rule? And will they not want to educate their children; and will not some of them take to

cheating and stealing, as the easiest and pleasantest way of making a living?

Ceb. Certainly, this is what we see in most states, Socrates.

Socr. Then, if the rulers in one state have found out a way, let us say, of teaching children by making education a pleasant game, like the Boeotians in their *παιδοκήπαιον*, or of preventing dishonesty and persuading those who cheat and steal, either by lantern-lectures or by oakum picking, or some other such clever device, that it is better and more profitable in the end to be honest; will not he be convicted of incredible folly, who, when he is legislating about thieves or young children, takes no account of these methods, forgetting the old saying that 'what is sauce for the goose is sauce for the gander also'?

Ceb. Why yes, Socrates, but may it not be that such an one is afraid of being charged with *πολυπραγμοσύνη*, and thinks, as you yourself have said, that each man should mind his own business? For I remember once hearing a witty fellow say that a jurist was a man who knew something about the laws of every country but his own.

Socr. Well aimed, Cebes, you are a good boxer I see, but I do not admit that you have 'landed,' as the sporting men would say, for this conclusion of mine about each man minding his business is not in any way, when you think about it, inconsistent with the true function of the legislator and the jurist.

Ceb. I am rather puzzled how this is, Socrates.

Socr. For what is it at which the true legislator or jurist aims? Is it not to lay down such laws as will make men good citizens, each fulfilling his proper function in the state, and giving what is due to his wife and his children, and his slaves, and his fellow citizens? And to do this, must not the legislator find out what is the true principle which ought to govern the relation between husband and wife, and master and slave, and debtor and creditor, and such like persons, and what punishments are best for the contumacious—seeking his knowledge from all states which he can meet with, and using his principle, when he has found it, as a sort of foot-rule—to measure the particular laws of each country, his own included, and see how some states exceed and others fall short of the true mean? And thus he will arrive—will he not?—at the perfect symmetry of the state, just as the sculptor, who has got the true idea of the beautiful from looking at many human forms of graceful proportions, will be able to see in what respect ordinary men and women err either by excess or defect.

Ceb. This certainly seems the right way of proceeding, Socrates.

Socr. And thus the legislator will be able—will he not?—to frame

laws which will procure for those he legislates for, that at which, as we said before, all communities aim—τὸ εὖ ζῆν.

Ceb. Assuredly, Socrates.

Socr. But I see, Cebes, that Ctesias has long since been beckoning us to make haste, and evidently thinks that I have fallen into one of my trances: so let us be going, and perhaps as the wine goes round Ctesias will be able to furnish us with some convincing arguments as to these proposals of his about our women.

EDWARD MANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

A History of the Law of Nations. By THOMAS ALFRED WALKER, LL.D.
Vol. I. Cambridge University Press. 1899. xxx and 361 pp.
(10s. net.)

THIS, the preface gives us to understand, is the first of two volumes. The present one goes back to the Israelites and comes down to the Peace of Westphalia (1648), that is to say to the time of Grotius. The traces of self-restraint exercised by the more civilized nations in antiquity are hardly to be classed as international, but the author reviews them all. It was only under the influence of the crusades and chivalry, and with the growth of different States on almost the same moral level, that an elementary international practice began to set bounds to the ferocity of the combatants in war, and to protect the friendly intercourse of men in time of peace. The Reformation let loose the baser instincts of mankind, but the Peace of Westphalia finally established a European system of territorial sovereign States, forming a community of nations, out of whose common interests, negotiations, groupings, and intercourse there grew up usages forming an international law properly so called. In the second half of the present volume Dr. Walker deals also with the theoretical writers and moralists who preceded Grotius and set men thinking about rights and wrongs in international relations. It closes with an exhaustive analysis of the contents of *De jure belli ac pacis*.

A history of International law is wanted. Ward's two volumes published in 1795 are necessarily out of date; Hosack's book is rather international history in general than history specifically confined to international law; and Wheaton's fine work is anything but exhaustive, and often diffuse and unsubstantiated by authorities. Dr. Walker's shows signs of a careful examination of sources and wide reading throughout, and his excellent index will make the book invaluable to the student. But the real test has still to come, for international law, in its practical aspect, as the author admits, has only grown up since Grotius. We much doubt in fact whether there is any connexion whatsoever between the international practices of antiquity and modern international law, except through the influence of the civilians.

Nor do we think Dr. Walker has sufficiently dwelt on the influence of the Italian Republics. These Republics formed a community of states long before the age of the Peace of Westphalia, and from them much of later European statecraft we know was derived.

T. B.

The Law of Landlord and Tenant. By WILLIAM MITCHELL FAWCETT. Second Edition. By JOHN MASON LIGHTWOOD. London: Butterworth & Co. 1900. 8vo. cxix and 608 pp. (21s.)

THIS work was first published in 1871, and this edition is certainly an improvement on the first. It is usually a matter to be regretted by the reader when it is ascertained that the author of a useful text-book has been forced, through press of engagements, to hand over the charge of an edition to a stranger. However, in this particular case the editor has, it appears, had some slight assistance from the author, but whether it is due to such assistance or not, it is clear that the present edition has been very carefully prepared; and in the main the crisp mode of dealing with the points discussed, which is of so great value to the hurried practitioner, has been preserved.

The book deals with all the case and statute law which can be fairly said to relate to landlord or tenant, but does not (see however notes on p. 442) pretend to furnish any precedents of leases or other transactions of a like nature. So far as we have been able to ascertain, the cases have been well selected, especial care having been taken not to irritate the reader with long lists of references to cases which only bear incidentally on the matter under consideration.

The index is clear, though not voluminous; and there is no doubt that this edition will create a very favourable impression among the legal profession.

B. L. C.

The Law as to the Appointment of New Trustees, with appendices containing forms and precedents and material sections of the Trustee Act, 1893, and the Lunacy Acts, 1890 and 1891. By J. M. EASTON. London: Stevens & Haynes. 1900. 8vo. xxiv and 207 pp. (7s. 6d.)

THIS little book will, it is thought, meet a real want. Hitherto practitioners have found it necessary to refer to many text-books to obtain any full information respecting the appointment of new trustees; the author has now placed at their disposal an admirable collection of the cases from all sources, and statutes dealing with this branch of the law.

Many mistakes on titles, involving considerable expense to rectify, have arisen by reason of insufficient care or knowledge of this subject, but this book, if widely used, ought to render such mistakes infrequent in the future.

The author (pp. 20, 145) seems to think that the question, whether a trustee 'refusing to act' within the meaning of the statutory power includes a disclaiming trustee, might with advantage be brought before the Courts. We would, however, submit that it is a little late, having regard to the universal practice of conveyancers to read the words as applying to a disclaiming trustee, for the Courts to be asked to consider the point.

It will be observed (p. 157) that the author, even in the case of the appointment of new trustees of a will, adds a declaration of trust to the deed of appointment. This, having regard to s. 8 of the Trustee Act, 1888, would operate to extend the time within which an action might be brought against the trustees, and it may be questioned whether it is proper to place the trustees, who execute the deed, in any worse position in regard to the Statutes of Limitation than the original trustees of the will.

B. L. C.

Archbold's Pleading, Evidence, and Practice in Criminal Cases. By Sir JOHN JERVIS. Twenty-second Edition, by W. F. CRAIES and GUY STEPHENSON. London: Sweet & Maxwell, Lim., and Stevens & Sons, Lim. 1900. 8vo. cxviii and 1349 pp. (31s. 6d.)

THIS well-known work may probably be taken as typical of the kind of text-book on which the English lawyer pins his faith. Most practitioners in our criminal courts entirely refuse, not without good reasons from their point of view, to take criminal law seriously, and most of our judges of one kind or another are too conscious of the wasted opportunities of their youth to care to deal with much of the law they hear propounded in the Crown Court as it deserves. The result is that Archbold has acquired a degree of authority to which it is not in the least entitled, either on the merits of the work or from considerations of practical convenience. Facts being as they are, however, it is very fortunate that the despotism of Archbold should be administered under the supervision of the present editors. No one could be found better qualified than Mr. Craies to perform the double task of introducing the greatest possible degree of order into the chaos bequeathed to us by the accumulated labours of Archbold, Jervis, Welsby and Bruce; and of introducing a dictum from Comb. or excising a judgment from 2 C. & K. Mr. Stephenson has an experience in certain mysteries, which, though short, is surpassed only by those of some four or five other men in the world. In matters of arrangement the editors are naturally hampered by the necessity arising from commercial considerations of avoiding any change which a careless reader would notice; but good work has been done by treating Murder and Manslaughter under the head of Homicide, and then going on with concealment of birth and abortion. Costs are most admirably treated of in a chapter of their own, and not as heretofore as a part of 'Parole Evidence.' Similarly compensation and restitution of property form the subject of another chapter, and need not be dug out of 'Verdict and Judgment' and 'Larceny' *passim*. In matters of detail enough bad law is left in to satisfy all reasonable superstition. We are still told what various judges in different circumstances thought constituted concealment, as when something was placed in an open box, in two closed but unlocked boxes in a frequented room, in a locked box, in a locked pinfold with a path along the top of one of its walls, and so forth. We regret to find that the editors have not gathered up courage to omit malice 'express or implied' from the definitions of murder and manslaughter, but they have at least put the reader in the way of discovering that the distinction is probably incomprehensible and certainly mischievous. The first matter they discuss in dealing with the two offences is how far they can be committed by an idiot who has 'a consciousness of doing wrong, and of course a discretion or discernment between good and evil' (1 Hawk, c. 1); but they forbear to remind us that it is no defence to murder to prove that the deceased was a Jew (1 Hale, 433). We owe the editors thanks for the discovery of *R. v. Keate*, 1697, Comb. 406, supporting the modern view of constructive murder in disapproving of the dictum as to the shooting at the barn-door fowl, and it is pleasing to find this case collocated with *R. v. Serni*, 1887, 16 Cox, 311 and *R. v. Whitmarsh*, 1898, 62 J. P. 711. Many new forms of indictments inspire us with confidence, not because we fully appreciate their merits, but because of the authorities quoted for their validity, and the great pains which have been expended in their collection. In minor matters of arrangement, such as paragraph side-headings, an elaborate system of indicating the effects of the legislation of

24 & 25 Vict., and above all in the index, which has repulsed all the attacks we have made on it, this work is as good as infinite pains and an appreciation of all modern book-making devices can make it. Altogether the work contains defects which will make it acceptable to the majority of its readers, and merits which will be gratefully recognized by the rest.

English Political Philosophy from Hobbes to Maine. By WILLIAM GRAHAM, Professor of Jurisprudence and Political Economy at Queen's College, Belfast. London: Edward Arnold. 1899. 8vo. xxx and 415 pp. (10s. 6d. net.)

HOBBS, Locke, Burke, Bentham, J. S. Mill, Maine—these are the writers upon whose works Mr. Graham has based his treatise on political philosophy. His method is to give a detailed account of the leading books and to add a running commentary of his own; but the commentary plays too conspicuous a part for the work to be really effective. It is useful to have the ideas of these great thinkers recapitulated and to have their relations to each other pointed out, but it would have been better had Mr. Graham trusted a little to the reader's power of reflection and restrained his own facility of criticism. The result is that a book which in design is good, and in performance is in many respects praiseworthy, is largely spoilt by being too discursive. One of the main objects at which Mr. Graham aims is the rehabilitation of the notion of natural law. 'May we not,' he says in his Introduction, 'attain to an *a priori* science of natural law or natural rights; and use and apply its principles deductively to new cases, as is certainly still done in courts of justice by our ablest judges? I believe we may, but more in the case of private than public law, more with reference to private rights than political rights.' And this position is strongly defended at the close of the book, where Mr. Graham repudiates the doctrines of Bentham and Austin, founded as they are upon utilitarianism and positive law, and seeks a basis for law in man's natural perception of justice. The only purpose of utility is to fill gaps in natural law or to restrain natural law when its full realization is impracticable. 'In short,' he says, 'the rules of justice rest fundamentally on natural justice and natural rights, supplemented by considerations of utility.' But, after all, the natural law which Mr. Graham champions is no more than the ideal law at which legislators aim, but to which they never completely attain. The notion of a 'law of nature' in the past has made the improvement of actual law more practicable, and it is in this aspect that the subject can be most usefully treated. But to attempt to revive the notion for English thinkers at the present time is to perpetuate confusion. Carefully calculated utility may be out of the question in many cases, and our safest course may be to base actual law upon the innate sense of justice. To this extent it is easy to go with Mr. Graham, and possibly this is all he means. But with respect to the law of nature as a distinct entity it is necessary carefully to confine the notion to its proper sphere. It has played a great part in days gone by, and as a matter of history it is important, but there its importance ends. For us the true modern law of nature is the idea of reason or reasonableness which pervades so much of the Common Law. We may add that medieval publicists who professed to be working out the law of nature constantly made the frankest appeals to utility—sometimes expressly *utilitas communis*—when they came to details.

The discussion of natural law, however, is only one feature of a book which ranges from the social contract to the latest developments of the political machine. The chapters on Burke are, we are inclined to think, the best part of the work, and the student will find them an excellent introduction to that statesman's writings. Bentham exposes himself more easily to criticism than most philosophers, and of this fact Mr. Graham takes full advantage. The reader who is interested in the estimate which a writer in political philosophy puts upon the prime ministers of the last 150 years should refer to p. 269, where the matter is discussed in connexion with our present method of selecting our rulers, the prime minister being, as Mr. Graham points out, our nearest approach to a king. The chapters on Mill stray rather far from politics and deal with sociology in general—an example of the discursive nature of the book on which we have already remarked. Taking the book as a whole, the student will find it a useful guide in his reading, and it should increase the general interest in the great writings with which it deals. Its value, moreover, is largely enhanced by the numerous historical parallels with which Mr. Graham supports his criticisms.

A History of Politics. By EDWARD JENKS, M.A. London: J. M. Dent & Co. 12mo. viii and 164 pp. [In the 'Temple Primers' series.]

THE scope of this book would perhaps be more readily understood if it was called a history of Government or of Institutions: but the growth of political science, and the ambition of divers younger branches of study to be included in it, have caused the word Politics to 'surprise in himself' many things which would indeed have surprised politicians of our grandfathers' time if represented to them as belonging to their art. Like Mr. Jenks's other writings, this exposition is ingenious almost to excess, and a little defective in the critical sense of proportion. But it is thoroughly well fitted to interest readers in the subject, and, while it will give them much to reflect on, will give them far less to unlearn than most books of the kind hitherto available to the miscellaneous reading public. For example, the importance of judicial institutions in general political development is now perhaps for the first time adequately insisted upon in a popular book. When Mr. Jenks, speaking of marriage by capture, represents the modern wedding tour as 'a survival of the flight from the angry relatives of the bride,' we presume he is jesting. This might be so if the wedding tour were an ancient, popular, and widespread Indo-European custom. In fact it is very modern, confined to persons of a certain social standing, and unknown or all but unknown outside English-speaking communities. The vulgar belief that a man may sell his wife, which has been acted upon in quite modern times as a short and simple method of divorce, is much more likely to contain a survival of something prehistoric.

Certain omissions in Mr. Jenks's book puzzle us. Next to nothing is said about the ancient military monarchies of the East, which surely formed a type of government important enough to deserve mention; and there is very little, though something, about the weaker specimens of the same type which survive in modern Asiatic kingdoms. Again, we find no recognition of the 'matriarchal' theory of prehistoric society which from about twenty to thirty years ago seemed like to carry all before it. If Mr. Jenks thinks it is dead, we do not feel called upon to be chief mourners. But McLennan was not an adversary to be despised, and we rub our eyes when

we see Morgan often cited and McLennan never. We have no right, perhaps, to assume from Mr. Jenks's silence about Mr. Kovalevsky's excellent work, accessible partly in English and partly in French, that he has not used it. There is none better of the kind. As to Ihering's brilliant posthumous '*Vorgeschichte der Indo-Europäer*,' it would hardly have been a safe source to draw upon for an elementary book. Mr. Jenks may or may not be already acquainted with it. If not, he has a good deal of intellectual pleasure to come. As to minuter points, it may be observed that there is nothing specially Pathan about the Persian word *khán*, and *zamíndárs* are by no means universal in India. The general reader for whom the book is intended would never suspect from Mr. Jenks's mention of this last term that it is pure Persian, and belongs to the official system of the Moghul dynasty. Certainly one cannot tell people everything in a small book: but there was no need to bring in such exotic terms at all.

The Law of Mines and Minerals. By the late WILLIAM BAINBRIDGE. Fifth Edition, by ARCHIBALD BROWN. London: Butterworth & Co. La. 8vo. lxxviii and 859 pp. (£2 2s.)

BAINBRIDGE on Mines has been familiar to a whole generation of lawyers. In the first eleven years of its life it passed through four editions, and it is now just twenty-two years since the fourth edition appeared. This is a long interval for a living branch of the law like that of mines and minerals, and it is no wonder that Bainbridge was being supplanted by younger rivals.

Mr. Brown appears now to have applied himself with zest to the preparation of the new edition and has produced a work which, whilst it retains a good deal of the old, includes so much that is new that it may almost rank as a new book. We have carefully tested it in many parts, and find it in all respects accurate and complete. It appears to contain references in the addenda, if not in the body of the work, to all important cases reported down to the end of 1899. *Hexter v. Pears* [1900] 1 Ch. 341 and *In re Newell* [1900] 1 Ch. 90 were decided last year, but as they were not fully reported till this year, some excuse may be found for their exclusion.

Not the least useful part of the book is the glossary of English mining terms, giving explanations of a large number of technical and local words the meaning of which is not easily ascertained from other sources.

The large collection of precedents for leases, conveyances, and so forth in the appendix will doubtless be appreciated by conveyancers. We can heartily congratulate Mr. Brown upon his work, and if our review is short in proportion to the importance of his work our excuse is that we have no faults to find, and that eulogy will not bear repetition.

Concise Precedents under the Companies Acts. Second Edition. By F. GORE-BROWNE. London: Jordan & Sons, Lim. 1900. 8vo. xlv and 1552 pp. (20s.)

It is curious to observe how much forms have become a part of the modern law book. They take the place of the diagram or pictorial illustration in other kinds of literature: so much so that the book of the future promises to be a book of forms with just as much law in the shape of notes as will render the forms comprehensible. Instead of the elaborate analysis and discussion of legal principles and the sifting of authorities contained in such a treatise as Lindley on Partnership for instance, practitioners content

themselves with dipping into digests, or with what Coke calls the 'tumultuary reading of abridgements.' The present volume, however, is not and does not profess to be a treatise on company law. It is a book of company forms with useful introductions and explanatory notes. In its first appearance—eight years ago—it was a small unpretending book: it has now expanded into a portly volume of 1,000 pages covering the whole field of company enterprise—Memorandums and Articles of Association, Promoters, Underwriting Calls, Meetings, Borrowing, Winding up, Reconstruction. 'Concise Precedents' is the title Mr. Gore-Browne gives to his book, and the forms deserve that description, but incidentally we note that Mr. Gore-Browne has not seen his way to give us a form of Memorandum of Association which does not in its enumeration of the company's objects exhaust, and more than exhaust, all the letters of the alphabet. Mr. Gore-Browne writes with the authority which comes of a practical as well as a theoretical acquaintance with his subject, and his book deserves to meet, and is certain to meet, with a favourable acceptance from the profession.

The Magistrate's Annual Practice, 1900: being a compendium of the Law and Practice relating to matters occupying the attention of Courts of Summary Jurisdiction, &c. By CHARLES MILNER ATKINSON, Stipendiary Magistrate for the City of Leeds. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1900. 8vo. lxxxvii and 878 pp. (20s.)

The Justice's Notebook, containing a short account of the Jurisdiction and Duties of Justices, and an Epitome of Criminal Law. By the late W. KNOX WIGRAM. Seventh Edition. By HENRY WARBURTON and LEONARD W. KERSHAW. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1900. xii and 444 pp. (10s. 6d.)

THIS is the fifth annual edition of the Magistrate's Annual Practice, which has before been noticed in this REVIEW as a very useful book. An annual edition is necessary, seeing that every year brings its additional burdens on the shoulders of justices, who, nothing loth, seem to have backs broad enough to bear any number of Acts of Parliament. This year justices are informed that 'It has been found necessary to add references to nearly fifty recent decisions of the High Court. There have, too, been passed during the current year (1899) more than a dozen statutes connected with the subject-matter of this work.' Yet men are ambitious, and seek to carry this burden with a light heart. The Summary Jurisdiction Act, 1899, may be mentioned as giving power to justices to punish young persons, and adults consenting, who set fire to any heath, gorse, furze, or fern. Formerly this offence could be dealt with only at assizes, with the result that practically convictions could be obtained only in very bad cases. All justices may be safely recommended to read this book, mark, learn, and inwardly digest it.

If such an addition to their burden as learning the law which they have to administer is too much to expect of human nature, the Justice's Notebook, which is really not a very formidable work to master, can be commended as a substitute. It is a good book, and handy for the use of a justice. His clerk is probably armed with a fat book of authority on the law, but as the justice is the responsible person, he may as well look up a case shortly stated, by way of check on his clerk. Justices should try to find out what evidence is.

The Stamp Laws, being the Stamp Acts of 1891, with the Acts amending and extending the same, including the Finance Act, 1899. By NATHANIEL J. HIGHMORE. London: Stevens & Sons, Lim. 1900. 8vo. xlviii and 323 pp. (10s. 6d.)

The Excise Laws. By NATHANIEL J. HIGHMORE. Second Edition. Two Vols. Vol. I, Management—Duties on Goods. Vol. II, Excise Licences—The Licensing Acts. London: Printed for Her Majesty's Stationery Office by Darling & Son, Lim., and sold by Eyre & Spottiswoode. 1899. Vol. I, xxxvii and 524 pp.; Vol. II, xxxviii and 669 pp. (30s.)

The Law of Stamp Duties on Deeds and other Instruments. By E. N. ALPE; revised and amplified by ARTHUR B. CANE. Seventh Edition. London: Jordan & Sons, Lim. 1900. 8vo. xxxii and 388 pp. (6s. net.)

MR. HIGHMORE'S book on the Stamp Laws contains a complete collection of the Acts relating to Stamps, and of the many sections conferring exemptions scattered up and down Acts not otherwise dealing with Stamp Duties. These exemptions form a long list and many of them cannot be very generally known. In point of date they extend from the Demise of the Crown Act, 1830, passed to exempt persons holding office or grants of pension from the Crown from payment of stamp duty on the demise of the Crown and reappointment to office or pension by the new Sovereign, down to the exemptions under the Truck Act, 1896. There are many useful tables in the book, and the notes appear to be quite up to date. In an Appendix will be found the Regulations for obtaining the adjudication of Stamp Duty by post. Mr. Highmore is careful to disclaim for the notes more than the expression of his personal views, but we think the profession will be glad to have even the personal opinion of the Assistant Solicitor of Inland Revenue on points of difficulty.

'Highmore's Excise Laws' is an official publication. The first edition was printed for official use only. To the present edition has been added the legislation for 1898 and 1899 and notes of recent cases. To all concerned with the Excise laws and the working of the Licensing Acts in the three kingdoms, this work will be well-nigh indispensable.

Seven editions in ten years say much for the utility and popularity of a law book. Under Mr. Cane's editorship the utility of Mr. Alpe's book should be fully maintained. Mr. Cane has thoroughly revised the book and brought it up to date. We have tested the cases noted and find that practically all cases decided before the Long Vacation of last year are included—*G. N. Ry. Co. v. I. R. Commissioners* [1899] 2 Q.B. 652 (July 27) is duly noted on p. 221, but is not to be found in the table of cases.

A Concise Treatise on the Law relating to Legal Representatives Real and Personal. By SIDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 8vo. xlviii and 271 pp. (10s.)

THIS is a concise abridgment of a very extensive subject which long ago received its full and complete treatment in the classical but ponderous work on Executors by the late Mr. Justice Williams.

The subject is here divided into seventeen chapters, treating all the principal branches of the law as comprehensively as the limited space allowed to each subject will permit. The references to authorities are

strictly confined within very reasonable limits, and the latest cases are cited by preference wherever applicable. There have not yet been many decisions upon the newly constituted office of 'Real Representative,' but so far as they have gone they are here collected. This book will not take the place of 'Williams on Executors,' but it will often supply information and references to cases which will enable the practising lawyer to dispense with further investigation into the matters there dealt with at greater length.

An Index of all reported cases decided in the English Courts and many of the Irish Equity cases during the period covered by The Revised Reports. Vols. I and XL. 1785-1836. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1900. La. 8vo. xix and 786 pp. (18s.)

THIS Index, although intended primarily for subscribers to the Revised Reports, is a work which will be found useful by others, and especially by the practitioner who has only a small library at his disposal. A rough calculation shows some sixty cases which have been overruled or judicially dissented from to be included as such in this Index and not in 'Dale & Lehmann.' In every instance referred to the criticism was reported before the publication of the latter work. It is only fair to assume that judicial comments in other directions are also more frequently noted in the new Index, which contains altogether some 35,000 cases. The compiler seems, however, to have overlooked the string of cases affirmed which are collected in 2 Russ. & M. at p. 751 and the observations of Lord Cairns in *Harrington v. Harrington*, 1871, L. R. 5 H. L. 87 at p. 107, 40 L. J. Ch. 716, respecting the authority of *Gower v. Grosvenor*, 1740, 5 Madd. 337 n., Barnard. 54.

The Licensing Laws so far as they relate to the sale of Intoxicating Liquors. By R. M. MONTGOMERY. Second Edition. London: Sweet & Maxwell, Lim. 1900. 8vo. lii and 541 pp. (18s.)

WE are glad to see a new edition of Mr. Montgomery's work. The second edition is much fuller than the first, and contains new chapters on covenants in leases relating to the sale of intoxicating liquors, covenants to take liquors from the landlord, and the innkeeper's liability in respect of the goods of his guest, besides some hundred new cases decided since the appearance of the first edition. The book, dealing as it does with such an intricate subject, is remarkably clear, and will be welcomed not only by the practitioner but by the general public who have occasion to deal with licensing matters. The cases referred to are well up to date, but one is somewhat surprised to find *Williamson v. Norris* [1899] 1 Q. B. 7, 68 L. J. Q. B. 31 omitted, as the case relates *inter alia* to the liability of a servant selling liquor by his master's order.

The principal Statutes connected with the subject are set out, and the Index is excellent. A word of praise should also be awarded for the way in which the work has been turned out.

Contracts in Restraint of Trade. By W. ARNOLD JOLLY. Second Edition. London: Butterworth & Co. 1900. Sm. 8vo. xx and 118 pp. (4s. net.)

THE author explains that 'The first edition of this treatise was published five years ago as a popular handbook. The book has now been re-modelled

and partly re-written, and in its present form is intended more particularly, if not exclusively, for the use of the legal profession.'

We may congratulate Mr. Jolly for having produced an admirably clear, complete, and sound treatise on this particular branch of the law of contract. The topic is, of course, dealt with by all writers at large on the law of contract, but we are not aware that it has ever before been treated quite so fully. It is a pity that the dates of all cases are not given. The excellent practice of so doing has now become general, and it is one that no text-writer should neglect.

Francis Lieber: his life and Political Philosophy. By LEWIS R. HARLEY, Ph.D. New York: Columbia University Press. 1899. 8vo. x + 1 leaf + 213 pp.

THE subject of this memoir, who died in 1872, is probably but little known in England, but his work has exercised great influence in moulding the best political thought of the United States. As a Prussian he witnessed the recovery of his country from the Napoleonic tyranny, and actually served in the Waterloo campaign, only to find himself an exile in the days of reaction which followed. After a futile adventure in the Greek war of independence, he settled for the rest of his life in America. He was an eminent publicist in the wider sense, but never a lawyer by profession. Nevertheless he had much to do with promoting the study of international law, and in particular with founding the *Institut de droit international*. His book on 'Legal and Political Hermeneutics' is not unfrequently referred to in American text-books.

A System of Medicine. By many Writers. Edited by T. CLIFFORD ALLBUTT. London: Macmillan & Co., Lim.; New York: The Macmillan Company. 1899. Vol. III. xiv and 998 pp.

THE only portions of this work that are of legal interest are those in which the medical jurisprudence of insanity and allied phenomena is discussed. The Introduction to this part of the work is written by Dr. Savage, who also contributes the articles on 'Mania,' 'Mental Stupor,' 'Toxic Insanities,' and (in conjunction with Dr. Wood) 'English Law and Practice in Lunacy.' No medical expert in this country is better fitted than Dr. Savage to deal with these subjects, and the only criticism we have to pass on his work is that in sketching the outlines of the law of lunacy he might with advantage have given references to a few leading authorities for his statements. Dr. Nicolson's statistical account of 'Criminal Lunacy in England' contains much fresh and not readily accessible information, and in all the medico-legal contributions the mean between too great scrapiness or generality and too great detail is well maintained.

We have also received:—

A Manual of Equity Jurisprudence for Students and Practitioners. By JOSEPH W. SMITH, Q.C. Fifteenth Edition. By SYDNEY E. WILLIAMS. London: Stevens & Sons, Lim. 1900. xxvii and 507 pp. (12s. 6d.).—This edition appears to be well posted up, but we regret that the editor did not lay bolder hands on it. Story's classification of equity jurisdiction is for all practical modern purposes dead and buried, and it can only confuse modern students to repeat his nebulous rhetoric about 'constructive fraud.'

Then there is something to be said for omitting the early history of the Court of Chancery altogether in an elementary book, and something for giving a concise but accurate historical statement. There is nothing to be said, in the face of modern historical knowledge—not to say Spence's still classical work—for bewildering novices with vague and inaccurate generalities. But the learner who confines himself to the practical parts of this book will no doubt find it a safe guide so far as it goes.

Law and Practice in Divorce and other Matrimonial Causes. By W. J. DIXON. Third Edition. London: William Clowes & Sons, Lim. 1900. 8vo. lx and 487 pp. (20s.).—The success that this book has attained fully justifies the favourable though concise review that we gave of the second edition (see L. Q. R. viii. 175). The preface states that the author has endeavoured in this edition to set out divorce law and practice in the usual order of the steps in the various proceedings, and has revised it up to date. The author follows the plan adopted in the former edition of attaching to each case in the Table of Cases a few words indicating the point raised in it. Probably this entails a vast amount of labour, but it will be very useful to the busy practitioner referring to the book in a hurry. We can only hope that this edition may meet with as much well-deserved success as the two former.

A Digest of the Law of Easements. By L. C. INNES. Sixth Edition. London: Stevens & Sons, Lim. xxiv and 131 pp. (7s. 6d.).—The success of this work is well deserved. Since its first appearance in Madras in 1878 it has been recognized by students and practitioners as a thoroughly reliable summary of the law on a subject of peculiar difficulty. This new edition contains references to the latest authorities, but otherwise the author has not found it necessary to introduce any important alterations of the text.

The Sudan Penal Code. 1899. 8vo. 130 pp. *The Sudan Code of Criminal Procedure.* 1899. 8vo. 136 pp. Cairo: National Printing Office.—The new Penal Code of the Sudan, authenticated simply by the signature 'Kitchener of Khartoum, Governor General,' is in substance identical with the Indian Penal Code. Besides the necessary verbal alterations, there are some omissions and transpositions, and a few amendments of language. The Procedure Code is also modelled in a general way on the Indian Criminal Procedure Code, but is, as might be expected, a good deal simpler.

Cato der Censor. Ein akademischer Vortrag. Nov. 1899. Von C. CHR. BURCKHARDT, Professor des römischen Rechts a. d. Universität Basel, 8vo. 32 pp.—A brilliant sketch of the leader of the old-fashioned country party in the later Roman Republic, but hardly within the scope of this REVIEW.

Stone's Justices' Manual, being the Yearly Justices' Practice for 1900. Thirty-second Edition. Edited by GEORGE B. KENNETT. London: Shaw & Sons; Butterworth & Co. 1900. 8vo. lxi and 1143 pp. (25s.).—The last edition of this well-known work was reviewed in L. Q. R. xv. 213. This edition appears to have been brought quite up to date.

Company Precedents for use in relation to Companies. Eighth Edition, by FRANCIS BEAUFORT PALMER, assisted by FRANK EVANS. Part II. Winding-up Forms and Practice. Part III (by the author only), Debentures and Debenture Stock. London: Stevens & Sons, Lim. 1900. La. 8vo. Part II, lxxxiv and 1174 pp. (32s.). Part III, xlviii and 634 pp. (21s.).—Review will follow.

The County Palatine of Durham: a study in Constitutional History (Harvard Historical Studies, vol. viii). By GAILLARD THOMAS LAPSLEY. New York & London: Longmans, Green & Co. 1900. 8vo. xi and 380 pp. (\$2.00 net.)—Review will follow.

Ruling Cases. Edited by ROBERT CAMPBELL. With American notes by LEONARD A. JONES. Vol. XIX, Negligence—Partnership. Vol. XX, Patent. London: Stevens & Sons, Lim. Boston, U. S. A.: Boston Book Co. 1899–1900. Vol. XIX, xxv and 777 pp.; Vol. XX, xx and 860 pp. (25s. net.)

The Annual County Courts Practice, 1900. Edited by His Honour Judge WILLIAM C. SMYLY, Q.C., assisted by W. J. BROOKS. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. 8vo. Vol. I, xxxiii and 1114 pp.; Vol. II, xv and 558 pp. (25s.)

Elphinstone's Introduction to Conveyancing. Fifth Edition. By Sir H. W. ELPHINSTONE, Bart., JAMES W. CLARK and ARTHUR DICKSON. London: Sweet & Maxwell, Lim. 1900. 8vo. xxxv and 566 pp. (14s.)

Lunacy Practice. By N. ARTHUR HEYWOOD and ARNOLD S. MASSEY. London: Stevens & Sons, Lim. 1900. 8vo. viii and 174 pp. (7s. 6d.)

The Law of Employers' Liability and Workmen's Compensation. Second Edition. By THOMAS BEVEN. London: Waterlow Bros. & Layton, Lim. 1899. 8vo. xlv, 424 and xxxix pp.

First Elements of Procedure. By T. BATT. London: Effingham Wilson. 1900. Sm. 8vo. xxviii and 256 pp. (3s. 6d. net.)

Interpleader in the High Court of Justice, and in the County Courts. By MICHAEL CABABÉ. Third Edition. London: Sweet & Maxwell, Lim. 1900. Sm. 8vo. xii and 232 pp. (6s.)

Rouse's Practical Man. Seventeenth Edition, with many additional Tables and Calculations. Revised by ERNEST E. H. BIRCH. London: Sweet & Maxwell, Lim. and F. P. Wilson. 1900. Oblong 12mo.

Every Man's Own Lawyer. By a Barrister. Thirty-seventh Edition, carefully revised, including the legislation of 1899. London: Crosby, Lockwood & Son. 1900. 8vo. xvi and 732 pp. (6s. 8d.)

The Elements of Mercantile Law. By T. M. STEVENS. Third Edition. By HERBERT JACOBS. London: Butterworth & Co. 1900. 8vo. xxxvi, 452 and 32 pp. (10s. 6d.)

The Annual Digest, 1899. Edited by JOHN MEWS. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. La. 8vo. xvi and 349 pp. (15s.).

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Lists of Cases followed, overruled, questioned, &c., have been omitted from this DIGEST, but the Publishers intend to bring out a New Edition of Dale and Lehmann's 'Overruled Cases,' by W. A. G. Woods and J. RITCHIE, Barristers-at-Law.

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THE
LAW QUARTERLY
REVIEW.

EDITED BY SIR FREDERICK POLLOCK, BART., M.A., LL.D.
Corpus Professor of Jurisprudence in the University of Oxford.

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THE LAW QUARTERLY REVIEW.

No. LXIII. July, 1900.

NOTES.

WE find it necessary to repeat that publications intended for the Editor of this REVIEW should be sent to him in London, at 13 Old Square, Lincoln's Inn, *and not to Oxford.*

When may a person be fairly charged, either morally or legally, with 'evading' the liability to death duties?

This is an inquiry which at the present moment constantly occupies the mind and occasionally distresses the conscience of persons who dread that the incidence of estate duty and succession duty may lead to the impoverishment of their children.

The moral question may be answered decisively and offhand. The legal and the moral duty in this instance precisely coincide. No Englishman is ever held bound, either by himself or by his neighbours, to pay a penny more of income tax than the Income Tax Acts as construed by the Courts impose upon him. The same principle applies to death duties. No man is morally bound to pay a penny of estate duty or of succession duty which is not legally due from him under the statutes by which these taxes are imposed.

When, then, may a man be treated by the law Courts as attempting to evade liability to death duties?

This is the question to which *Sims v. The Registrar of Probates* [1900] A. C. 323, gives something like an answer.

The case was decided, it is true, under an Australian Act, but the considerations on which it turns are of general application.

'Everybody agrees,' say the Privy Council, 'that the word [evade] is capable of being used in two senses, one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable' (*ibid.* p. 334),

and the general conclusion drawn by the Privy Council appears to be that 'evasion' in the legal sense, i. e. in the sense in which it may render an attempt to escape liability to death duties void, implies some underhand dealing or the existence of some sham transaction, such as an apparent gift by *A* to *B*, under which *A* does not in reality part at all with the property which he in form gives away. What is at any rate perfectly clear is that, even under an enactment more stringent than the English statutes which impose death duties, a man cannot be held to evade the law simply because he makes a perfectly honest and real gift of his property with the avowed motive of saving his children from the payment of death duties on his decease. In this matter the words of Lindley L. J. in *Yorkshire Wagon Co. v. Maclure* (1882), 21 Ch. D. 318, C. A., are still full of instruction. 'There is always an ambiguity about the expression "evading an Act of Parliament." In one sense you cannot evade an Act of Parliament; that is to say, the Court is bound so to construe every Act of Parliament as to take care that that which is really prohibited may be held void. On the other hand, you may avoid doing that which is prohibited by the Act of Parliament, and you may do something else equally advantageous to you which is not prohibited by the Act of Parliament.' Evasion, in short, in the sense in which it is legally or morally culpable, implies dishonesty.

The Attorney-General v. Merthyr Tydfil Union [1900] 1 Ch. 516, 69 L. J. Ch. 299, C. A., has a singular interest for persons versed in the comparative study of institutions.

The case exhibits, on the one hand, the fundamental difference between English and foreign ideas as to the functions of the ordinary courts. The judgment of the Court of Appeal has, in effect, determined a matter of high policy. We may be certain that on the continent, and especially in France, the ordinary judges would have deemed that the sort of question raised in the *Attorney-General v. Merthyr Tydfil Union* lay outside their jurisdiction; it would have been determined either by the direct action of the executive or by administrative tribunals, which, though in France, at least, they have now developed into real courts, have a distinctly official character.

The case shows, on the other hand, a tendency of modern legislation to introduce into England administrative arrangements which have an affinity to the *droit administratif* of France; the power of the Local Government Board to sanction payments made by the guardians in relief of the poor, even though made unlaw-

fully, may be practically expedient, but it is alien to the strictly legal spirit of English constitutionalism. It increases the discretionary power of the administration, whilst it diminishes the legal authority of the Courts.

The Lord Chief Justice in his recent discourse on advocacy told us that when he was at the bar, he once went before Lord Westbury with an armful of authorities to support his argument, whereupon Lord Westbury said, 'Mr. Russell, before you cite those cases, have you made quite sure that the facts in them are the same as those of the present case? . You will probably find, if you examine them closely, that most of them are irrelevant.' This is advice which may be commended to the profession generally, which 'runs at large,' as O. W. Holmes, sen., would say. It would have saved much citation of authorities, for instance, in *Burchell v. Wilde* ([1900] 1 Ch. 551, 69 L.J. Ch. 314, C.A), if the facts there, in particular the terms of the dissolution agreement, had been attended to. By that agreement, as expressed in the award, the clients' business and papers were to be divided, some going to the Burchells and some to the Wildes, and the goodwill so far as it was an incident of the possession of the papers was also to be divided between them—not to be sold. This was the scheme of the dissolution. The name of the old firm was one of the assets—the partners were tenants in common of it—and the obvious inference of intention—coinciding with the legal result in the absence of agreement—was that each set of partners were to be entitled to use it. Given these conclusions, the case resolved itself into nothing more than one of fact, viz. whether the defendants Burchell, Wilde & Co., were using the name in such a way as to expose the plaintiffs, Burchells & Co., to liability or risk of liability. In this respect people must not be too particular. Nearly everybody is liable to the inconvenience of being mistaken for some one else.

X & Co., the proprietors of a circulating library, circulate copies of a book, which, unknown to them, contains a libel on *A*; they are prima facie publishers of a libel, and, if they cannot show that their ignorance was free from negligence, they are liable to *A* in damages: *Vizetelly v. Mudie's Select Library* [1900] 2 Q. B. 170, C. A.

There is nothing, be it noted, in this case which really conflicts with *Emmens v. Pottle* (1885), 16 Q. B. D. 354. That case establishes that a newsagent who sells a newspaper in the ordinary course of his trade is prima facie the publisher of any libel contained therein,

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the date of the resolution and the shares saddled with the lien were shares allotted to him as the company's vendor. The alterability of articles is a risk with which members of a company must always reckon, and the above case emphasizes the risk. True, a company cannot break its contracts by altering its articles, but it may do something very like it by making its contracts subject to revocable articles. An ordinary shareholder may find, for instance, preference shares created in front of him (*Andrews v. Gas Meter Co.* [1897] 1 Ch. 361, 66 L. J. Ch. 246, C. A.); a preference shareholder may find himself docked of half his interest by an all round reduction of capital (*Bannatyne v. Direct Spanish Cable Co.*, 34 Ch. D. 287, 56 L. J. Ch. 107); a retiring member of a building society may find that a sum of money he was counting on has been given a different destination by new rules (*Pope v. City & Suburban Building Society* [1893] 2 Ch. 311, 62 L. J. Ch. 501). These are incidents of the Joint Stock Company system and a majority control. The imposition of a retrospective lien is *eiusdem generis*. Lord Justice Romer playfully suggested a clause in this form: 'Caution! Remember the power of the company by altering its articles to extend its lien.' If such a note is, as the Lord Justice thought, unnecessary in articles, shareholders should certainly make a mental memorandum of the contingency.

The right of the public with regard to a highway is, as every lawyer knows, to pass and repass along it—*Dovaston v. Payne* (1795) 2 H. Bl. 527, 3 R. R. 527—and though highways are dedicated *prima facie* for the purpose of passage, things may be done upon them which go a little further than mere passing, which are recognized as a reasonable and usual mode of using a highway: *Harrison v. Duke of Rutland* [1893] 1 Q. B. 142. Thus a man may sit down for a time to rest himself by the side of the road, or may make a sketch from a highway without running the risk of being treated as a trespasser. But one must never lose sight of the fundamental principle that a highway can legally be used only in a reasonable and usual manner, and for its ordinary purposes. Hence if *A* passes again and again up and down a highway which crosses *B*'s land for the purpose of watching *B*'s racehorses whilst in training, and reporting their performances to a newspaper, *A* exceeds the ordinary and reasonable uses of the road. *Hickman v. Maisey* [1900] 1 Q. B. 752, 69 L. J. Q. B. 511, C. A. This we venture to say is good sense, as indeed are most of the rules of common law as applied by the Courts. No one ought to be allowed to use a highway in order to play the part of a spy.

An English Court of Bankruptcy has no jurisdiction to adjudge bankrupt any 'debtor' who is not in strictness a 'debtor subject to the English Bankruptcy Act.'

This is the principle, and it is a clearly sound one, to be deduced from *In re Pearson* [1892] 2 Q. B. 263 and *Ex parte Blain* (1879) 12 Ch. Div. 522, but, as applied by our Courts, it considerably restricts their bankruptcy jurisdiction in respect of foreigners.

X, an alien, is resident out of England and carries on business there without himself coming to England. He has assets in England, he contracts debts there, he executes out of England an assignment of his property for the benefit of all his creditors. He is clearly from one point of view an English trader, but our Courts have no jurisdiction to make him bankrupt. *In re A. B. & Co.* [1900] 1 Q. B. 541, 69 L. J. Q. B. 375, C. A. Hence the general result follows that an alien not domiciled in England cannot be made bankrupt here unless he commits an act of bankruptcy in England, and it must be added that it is far easier to enumerate the circumstances under which a foreign debtor is not a debtor subject to the English bankruptcy law than to determine positively the conditions which render him subject to our bankruptcy law. The leaning, in short, of English judges clearly is against rather than in favour of the extension of bankruptcy jurisdiction over foreigners (see especially [1900] 1 Q. B. p. 544, judgment of Lindley M.R.).

It seems a sound principle (though not universally admitted, as appears elsewhere in this number) that the publication in a newspaper of an article containing scurrilous personal abuse of a judge with reference to his conduct as a judge, in a judicial proceeding which has terminated, is a contempt of Court punishable by the Court on summary process—*Reg. v. Gray* [1900] 2 Q. B. 36, 69 L. J. Q. B. 502—and this principle must from time to time be enforced. Still those who value most highly the summary, and of necessity indefinite and arbitrary, power of the Courts to enforce their authority, and therefore to protect the course of justice by summary procedure, may regret that the right of committing for contempt, just because of its high value, should be exercised in any but cases of the clearest necessity; and *Reg. v. Gray* suggests the reflection that where the course of justice is not distinctly interfered with, our judges might occasionally do well to treat scurrilous abuse with contemptuous indifference. The effect of English example in Colonial Courts must not be forgotten. Some judges in small Crown colonies, armed with the powers of English superior Courts,

strike students unacquainted with conveyancing as a curious result of legal subtlety, but independently of the high authority in the matter of powers of Farwell J. it will be seen that his judgment in *Poney v. Hordern* is a strictly logical consequence from the doctrine of English law as to the nature of a power of appointment.

The floating debenture is a species of security which has found great favour with the commercial world in England; not so in France. By French law chattels can be charged only by way of pledge involving delivery, actual or constructive, to the pledgee. This conflict of laws naturally gives rise to legal puzzles of some nicety where an English company issues floating debentures charged on assets of the company in France. *In re Maudslay Sons & Field* ([1900] 1 Ch. 602, 69 L. J. Ch. 347) was an illustration. The particular asset—the bone of contention there—was a debt due to the English company from a French firm. This debt was comprised in the debenture holders' security: the security had become enforceable and the debenture holders had obtained the appointment of a receiver by the English Court, but before the receiver had got possession, a French creditor of the company had attached the debt in due form. As the debt had its locality in France it was governed by French law, and the legal position accordingly resolved itself into this: by English law the debenture holders had an equitable charge on the debt; by French law the debt was a free asset of the company. This being so, there was nothing to displace the French creditor's title by attachment. The existing appointment of a receiver on behalf of the debenture holders really creates no difficulty. The English Court does not by appointing a receiver give, or purport to give him, possession of the foreign property. It only clothes him with authority to assert the claim of the debenture holders subject to what the *lex loci rei sitae* may have to say on the point. It is therefore absurd to talk of any contempt of Court in such a case by interference with its officer, for there never was any possession to interfere with.

No portion of English law is so unsatisfactory as the constantly increasing portion of it which is created by the judicial interpretation of Parliamentary enactments. A good example of the results produced by the rigid interpretation of a laxly drawn statute is to be seen in *Upperton v. Ridley* [1900] 1 Q. B. 680, 69 L. J. Q. B. 475. Under the Police Act, 1890, 53 & 54 Vict. c. 45, a constable, after he has completed a certain number of years approved service, is entitled to a pension which is to be calculated on the amount of his

'annual pay' at the date of his retirement. A constable is appointed to attend permanently on special duty at the House of Lords, and for the discharge of this duty he is entitled to a shilling a day in addition to his ordinary salary. It has been held by Channell J., Bucknill J. dissenting, and therefore in effect by the Q. B. D., that this extra remuneration forms no part of a constable's 'pay' for the purposes of calculating his pension. The decision is an unfortunate one. It places upon an Act of Parliament, which constitutes in fact the terms of a contract under which a policeman enters into the public service, an interpretation which every layman will feel to be absurd and unjust. The view of the Court, as represented by Channell J., may possibly be justified on grounds of rigid adherence to the words of an Act of Parliament. But many persons will hold with Bucknill J. that the money 'paid' to a policeman is part of his 'pay,' and further that in construing a document which is in reality a contract, a Court ought, if possible, to have rejected an interpretation of its terms which inflicts a hardship upon one of the parties to the agreement.

Those who shave or are shaved (and the whirligig of time has brought the fashion round to them again of late) will be glad to know, on the authority of *Palmer v. Snow* [1900] 1 Q. B. 725, 69 L. J. Q. B. 356, that a barber who shaves customers on Sunday is not a 'tradesman, artificer, workman, labourer, or other person whatsoever,' within the meaning of 29 Car. II. c. 7, s. 1, which prohibits these persons from exercising any worldly labour, business, or work of their ordinary callings upon the Lord's Day (works of necessity and charity only excepted). But we confess to finding it difficult to believe that the legislators who meant to prohibit the exercise of a man's ordinary calling for gain on Sunday really intended to allow barbers to pursue that branch of their business on the Lord's Day. The reason given is that the seventeenth-century barber was little lower than a surgeon. But it might be replied that his services in blood-letting and other surgical operations would be within the exception of works of necessity. The fact is that a good deal of Sabbatarian legislation is out of date, and our judges are unwilling to give their natural interpretation to statutes of which they no longer understand the spirit.

There was a time when smoke in a house was not regarded as a serious interference with domestic comfort. The hall of even so noble a pile as Penshurst was warmed by an open brazier in the

centre from which smoke-clouds must have rolled to the blackened rafters above, and indeed such a brazier was used in the hall of Trinity College, Cambridge, till 1866. But 'the thoughts of men are widened with the process of the sun,' including their ideas of comfort, and a smoky chimney may now certainly be classed in Lord Justice Knight Bruce's language as 'an inconvenience materially interfering with the ordinary comfort physically of human existence,' and this without the objector exposing himself to the imputation of fastidiousness or of elegant and dainty modes of living. The law has to keep pace with these improved social conditions, and its progress is illustrated in the construction of covenants of quiet possession and the larger views of what that covenant means. It means a good deal more in these days than not having the title or possession of the demised premises interfered with: it means 'ordinary and lawful enjoyment' of them (*Sanderson v. Berwick-upon-Tweed Corporation*, 13 Q. B. D. 547). A landlord who has let a residential flat to a tenant, for instance, in a building which is held out to be used for residential flats only, is interfering with the tenant's 'quiet enjoyment' if he converts part of the building into a club (*Hudson v. Cripps* [1896] 1 Ch. 265, 65 L. J. Ch. 328). *Aldin v. Latimer* ([1894] 2 Ch. 427, 63 L. J. Ch. 601) is another progressive case. In the recent case of *Tebb v. Cave* ([1900] 1 Ch. 642, 69 L. J. Ch. 282) the landlord had carried up an adjoining building to a much greater height than the plaintiff's premises, and the obstruction somehow caught the current of air over the roof and drove it down the plaintiff's chimneys. These freaks of nature are puzzling no doubt to the unscientific mind, but they must be reckoned with. The good chess-player sees five moves ahead, and the enterprising town builder must be as far-sighted, or he should not covenant for quiet possession.

Varley v. Whipp [1900] 1 Q. B. 513, 69 L. J. Q. B. 333, exhibits neatly the essential distinction between a condition and a collateral warranty in a contract of sale. *A* agrees to sell *X* a specific threshing machine which he describes as possessed of certain qualities. *X*, who knows nothing of the machine except *A*'s description of it, agrees to buy it. *A* tenders the machine, but it does not possess the qualities he ascribed to it. *A* has broken the condition on which the machine was bought by *X*, and *X* has a right to reject it on the very simple and adequate ground that *A* agreed to sell him one thing and has tendered him another, i. e. has not performed his part of the contract. If however, *X*, on seeing the machine, had agreed to buy it on the terms of *A* guaranteeing or giving a warranty that it had certain qualities, e. g. could work at a par-

ticular rate, then *A* would have entered into a merely collateral agreement, and if the machine had turned out not to have the power to work at the rate specified, *X* could not have treated the main contract as broken since he had received the very machine which *A* had undertaken to sell. He could, however, have sued *A* for damage arising from the breach of *A*'s warranty. But though the distinction between a condition and a warranty is not in itself hard to seize it is in practice often hard to apply, for there may be a difficulty in determining whether a description was intended by the parties to be a condition of *X*'s buying a particular article, or only a guaranty that it should possess certain qualities, e.g. in the case of a watch, that it should keep time for at least a year. It is satisfactory to observe that nothing turned on the language of the Sale of Goods Act, which was admitted to have made no change in the law.

The Savoy Hotel is a shop within the meaning of the Shop Hours Act, 1892, 55 & 56 Vict. c. 62, and a page boy, who is principally employed as a messenger, but partly also in assisting to dust the reception rooms, is not exempted from the operation of the Act as being a 'person wholly employed as a domestic servant.' Such a page, therefore, cannot be employed in the hotel for more than seventy-four hours in any one week without exposing the owner of the hotel to a penalty: *Savoy Hotel Co. v. London County Council* [1900] 1 Q. B. 665, 69 L. J. Q. B. 274. 'This case is,' to use the words of Channell J., 'not altogether free from difficulty,' but if we assume that the judgment of the Q. B. D. is right, it is impossible not to feel that it suggests one or two curious questions.

Were the general public, for instance, or even most members of Parliament fully aware that the Shop Hours Act, 1892, applies to many places, such for example as hotels, which no human being would ever call shops?

Is it desirable that an Act should be described by a name which conceals its real nature?

On what principle is it legally allowable to overwork a domestic servant employed in a private house, whilst it is not legally allowable to overwork a domestic servant employed in an hotel?

Is it possible that the exclusion of domestic servants from the protection of the law should permanently continue?

If, lastly, the Shop Hours Acts are extended to all young persons in service, where is the interference of the law to end?

a trial there for a given day and hour than it is to stay at a great expense at a provincial hotel,' &c.

'The limit of £50 imposed in Common Law cases on the jurisdiction of County Courts has become quite nominal, and the number of remitted actions annually determined shows that the County Courts are gradually developing with general Courts of first instance. . . . The County Court Bench now comprises lawyers who would not discredit the High Court, and who are fully competent to adjudicate upon complicated cases' (42 Sol. Jo. 790).

The conclusions, then, at which many eminent persons have arrived at different times and in various ways are; that the majority of County Courts do their work well, and are yearly increasing in favour with the public; that the theory that there is a remarkable difference between the qualifications of the Judges of the High Court and of the County Courts—a theory upon which the separation of the jurisdiction is founded—is now for the most part obsolete; that amongst these Judges are men of great legal attainments and experience who would be fit to sit in any tribunal (see *Times* Art., Nov. 1, 1897); that in any adequate scheme for the Judicature Act of the near future these conclusions must be recognized, and the proposals of Lord Selborne, Lord Bramwell, Lord Justice James, and Mr. Justice Willes in 1872—that these Courts should be branches of the High Court with co-ordinate jurisdiction—carried into effect.

Let us consider first some of the most important changes which would be brought about if this well-godfathered scheme were carried out, and then in what way it would probably be carried out.

When perfected—a matter of time and care—the distinction between 'Superior' and 'Inferior' Courts of Civil Procedure would cease. For high and low, rich and poor, there would be one fountain of justice, the 'Supreme Court'—consisting of the 'High Court' and the 'Court of Appeal.' Many other good things would follow upon this change, e. g. one code of practice would take the place of two; Divisional Courts, 'anathema' to Bench and Bar; Certiorari, Prohibition Remitter, with the useless learning connected with them, would all disappear; relics of by-gone times, such as the Bristol Tolsey Court, Exeter Provost Court, and all local Courts, would be merged, and no man's time would be any longer wasted in puzzling out the eccentricities of local procedures. These are small matters no doubt, but in the stress of modern life every extra straw—every unnecessary worry—takes something from a worker's energy.

But to turn to greater gains. In time—for it is not supposed that such a scheme would, or could, be hastily carried out in all its parts—the present anomalous distinction between 'Her Majesty's'

Judges, and Judges, who administering justice as agents of the same sovereign power are not 'Her Majesty's' Judges, would gradually cease. All Judges of first instance would be members of the High Court, exercising the same jurisdiction and having the same status and style. At present, omitting Presidents of Divisions, there are twenty-one Judges of the High Court, and fifty-seven Judges of County Courts. The salaries of these twenty-one High Court Judges, omitting Circuit allowances, amount to £105,000. That of the fifty-seven County Court Judges to £85,500. Total judicial salaries, £190,500.

Now the cry of the profession on all hands is, give us more Judges! It is a wise, and as things are, a well-founded cry; for if Judges are to be able to try causes in a patient, leisurely way, and not to stampede through cause lists (a thing more hateful to suitors than costs or delay), if justice is to go speedily to every man's door and to the gate of every gaol, then there must be a liberal provision of judicial power. Suppose then that from the present County Court Bench, some number—say twenty—were selected (those who are also Recorders being chosen first) and were made Judges of the High Court, and were sent by way of experiment to various centres for civil and criminal business as justices *in itinere*, this would, it is presumed, meet some part of the present wants. But here arises the delicate question of judicial salaries—a question which, however, must be faced sooner or later.

The salaries of the High Court Judges were fixed at a time when the state of the Bar and the gains of its leaders were very different to what they now are. They were also settled under influences which have been considerably weakened, and in deference to views which have become greatly modified. It may be stated, with as much accuracy as is consistent with such a statement, that the average yearly income of the present leaders of the Bar, with some few exceptions, does not exceed £3,000 a year. From this sum deductions must be made—rent of chambers, salaries of clerks, fees unpaid, &c. There are also contingencies to be considered—loss of health, accidents, the dropping off of old clients. If you give a man in such a position the high social position of a Judge, absolute security of income, and a handsome retiring pension, it seems unnecessary to give him, as in most cases you now give him, an additional income of £2,000 a year. 'Men,' says the Lord Chief Justice, speaking of the Bench of the Supreme Court of Washington at the Hardwicke Society in May last, 'were attracted (to the Bench) not by the greatness of the emoluments of the position, but because it was a great position.'

There is a certain vulgarity of sentiment in the supposition that

a Judge must be rich in order to inspire respect. Judges, as a rule, are men of literary tastes who do not live and do not desire to live ostentatiously. They are respected not according to their riches, but for the qualities which are a tradition of the English Bench, and because they administer, as the Sovereign's agents, her great prerogative of justice. It is the duty of the Government in this matter, as trustee of the public purse, to be very liberal without being lavish, and, it is submitted, the point for any Government to consider in this behalf is, can competent Judges be got for a less sum than that now paid to them? It has been shown that in the opinion of many persons they certainly can, and it is unlikely that any one familiar with the personnel of the Bar would express any doubt as to there being at this moment an adequate supply of men, possessing all the needful qualifications, who would gladly exchange the uncertainties of professional life for the position of a Judge of the High Court with a salary, let us say, of £2,500 a year including travelling and clerical expenses, a provision indeed far in excess of the standard adopted in the United States, the salary of the Chief Justice of the Supreme Court of the Federal Judicature being £2,100 per annum, whilst that of the State Judges averages £800 to £1,000. Happily the due administration of justice does not require the possession of abilities which are exceptional. Some knowledge of law, patience, industry, common sense, and a fair unprejudiced mind, in addition to those qualities usually found amongst English gentlemen, are sufficient for all practical purposes, as every day's experience shows. The great advocates add lustre to the Bench, but their special abilities are not required for the performance of ordinary judicial duties. The Court of Appeal, constituted as suggested in the following sub-heading, would afford a suitable retirement for these and other leviathans of the law.

Supposing, then, the experiment were made of appointing twenty Judges of County Courts, men chosen for their experience in *visi prius* and criminal work, giving them the status of High Court Judges and salaries of £2,500 per annum. There would then be a staff of forty-one High Court Judges, thirty-five of whom would be available for any common law or criminal business. If such an experiment succeeded, the scheme could be pushed further. Judicial centres, following the system which has worked so well in the Palatine Court of Lancashire, might be established in various chief towns, and the County Court Judges, or most of them, would be gradually absorbed into the High Court. It is probable that it would be found in time that a staff of seventy Judges would be amply sufficient to supply the wants of the country. That being so, the cost of such a staff, when by effluxion of time all the judicial

salaries of the High Court were equalized, would be £175,000 per annum, as against a present outlay of £190,500. Now the principal difficulties of the present situation are the want of a larger judicial staff, and the reluctance of the Legislature to increase the present staff of the High Court to the extent required at the present rate of salary. It has been said that the minimum number of extra Judges now wanted is six, which as things are would mean extra judicial salaries to the amount of £30,000 per annum. But the twenty extra Judges above mentioned would only cost an extra £20,000 per annum, and very possibly it would be sufficient, as an experiment, to appoint only ten of these, and these might be obtained at a cost of an additional £10,000. It may be objected that the work now done by these ten or twenty County Court Judges so to be chosen would suffer. But in many County Court districts the business is not sufficient to occupy all the time of an active energetic man, and by careful selection, by some alteration in districts, and by enlarging the powers of the Registrars (and their salaries) any difficulties on this score might be avoided.

By proceeding towards the realization of this scheme slowly and tentatively—and there is no reason to suppose that in this country it will be sought with undue haste—there need be little friction or dislocation of existing interests. It would take time to see how these ten or twenty new district tribunals worked, and how and to what extent their work affected the work of the Courts in London. In the meantime, business would go on as at present. If the experiment succeeded, the principle would be extended, new District Courts would be established, and, very gradually, modifications of existing arrangements would become necessary.

It is not necessary to go into details, and space does not permit it; but the broad principle which forms the foundation of all successful administration, legal or otherwise, is that two things must exist together—administrative ability, and ample material upon which it can be exercised. Of the former we have an ample supply, of the latter, it is submitted, we have it in our power, by comparatively slight modifications of existing arrangements, to secure an ample supply.

The Lord Chancellor, assisted, if it might be so, by his Board of advice and by the Lord Chief Justice, and having at his disposal a band of seventy Judges ready 'to go anywhere and do anything,' would soon be able to remedy the innumerable defects in legal administration which are attributable to deficient judicial power.

Reform generally means a demand upon the Exchequer. It does so in this case. Ten thousand pounds would be required for the experiment. But in the future the total judicial salaries would be

considerably less than they are at present, and the judicial power would be more than doubled.

Since this article was written it is rumoured that the extension of the jurisdiction of County Courts is engaging the attention of the Lord Chancellor. Mr. Monk's Bill is an effort in a similar direction. If this object is attained, the ultimate step in the evolution of County Courts will have been made, and their absorption with the High Court will be merely a matter of time, as the figures and diagrams of Master Macdonell set out in His Honour Judge Snagge's article seem clearly to show.

III. THE APPELLATE JURISDICTION.

It is not stating the case too highly to say that every lawyer of eminence in 1873 desired, with Lord Selborne, to put an end to double appeals. 'You never can escape by going through any number of Courts of Appeal from the risk of differences of opinion in each and every one of them, and from doubts arising as to whether the last Court decided better than those before it. What you want is to make as good a Court as possible, and to give it all the power and authority you can by making it final,' per Selborne C. (*Hansard*, 21, 4, p. 331); and the same view was taken by such statesmen as Lord Salisbury, Mr. Disraeli, Sir W. V. Harcourt, Earl Grey, &c.

In cases of complication and difficulty, subtle and ingenious minds of equal power will frequently arrive at different conclusions, and if the law is finally settled by the House of Lords in such cases as *Salomon v. Salomon*, *Allen v. Flood*, *Powell v. Kempton Park*, &c., and the like, it is possibly so settled because there is no Court of Appeal beyond.

In the vast majority of appeals the law is, for all practical purposes, sufficiently well settled by the decision of three distinguished Judges, and in the comparatively rare cases of great difficulty and importance, a provision, such as Lord Selborne intended to make, for hearing or rehearing before a large number of Judges, either on the suggestion of Counsel or on the motion of the Court itself, would insure an ample guarantee against any miscarriage of justice.

All parties then in 1873 were at one in desiring to put an end to the expense and delay incident to the system of double appeals, but when the means by which this end was to be accomplished came to be considered, differences of opinion arose. There were two ways by which it was then thought that the result desired could be attained, namely, either by making the Court of Appeal, constituted by the Judicature Act, the final Court of Appeal, and by transferring to it,

as far as English appeals were concerned, the appellate jurisdiction of the House of Lords: or by strengthening the judicial body in the House of Lords by the introduction of a certain number of Judges as life peers, and so making the House of Lords itself the *one, and final*, Court of Appeal.

As memory is short in these days, and as the generation which followed the debates on this subject is passing away, a very short statement of what then happened is necessary. Broadly speaking, Lord Selborne and Lord Cairns were in 1873 at one in thinking that the Supreme Court should consist of the High Court and one final Court of Appeal, and consequently by the Judicature Act of that date the ancient appellate jurisdiction of the House of Lords, as to English appeals, was transferred to the Court of Appeal constituted by the Act. When, however, Mr. Disraeli came into power in 1874, the Conservatives, who had never cordially accepted this transfer of jurisdiction, pressed Lord Cairns to introduce measures for the repeal of those sections of the Act of 1873 which related to such transfer. In 1876 this was done, the jurisdiction of the House of Lords was restored, and the system of double appeals brought back without check or restraint, and so things remain at the present day.

The alternative course, however, found favour with many eminent persons, and the Marquis of Salisbury moved in committee on the Bill of 1873 an amendment, to the effect that it should be lawful for Her Majesty to direct a writ to be issued to certain Judges enabling them to sit and vote during their tenure of office as Peers of Parliament, and in support of this amendment he said, 'my answer to the question—what is the practical advantage of such a course?—is that if adopted it will serve to connect the House of Lords with the Supreme Court of Appeal. This House will no longer be actually the Supreme Court of Appeal, *but the Supreme Court of Appeal will be in it*, and whatever prestige the House derived from the past, that it was the highest Court of Appeal, it will in some degree continue to possess if every member of the Supreme Court is by right a member of it.' The amendment was withdrawn. Life peerages, though not unknown to the Constitution, were not viewed with favour in those days; and when Lord Cranworth introduced a Bill which would have conferred life peerages upon two salaried law lords, it had to be withdrawn in the Commons. The expediency of creating life peers, however, continued to be long discussed, and in 1876 three Lords of Appeal in ordinary were constituted by statute with the rank of barons for life, and the principle is now firmly established.

That which was practically impossible in 1873 has become feasible, and the scheme which then failed by reason of the political

circumstances of the time could now be carried into effect with benefit both to the House of Lords, to the Court of Appeal, and to the public. For, to quote the Marquis of Salisbury again, 'A Supreme Court of Appeal would benefit amazingly if its members were members of the Legislature,' and 'the Legislature would benefit enormously if the members of the Court of Appeal belonged to it' (Hansard, xxiv. p. 1728). Lord Selborne also was of opinion that there would be 'some gain of dignity, independence, and stability to the administration of justice from its association with the House of Lords, and to the House of Lords from its association with the administration of justice' (Selborne, Memorials, chap. xiv).

Lord Selborne proposed in his original scheme to have taken power for the Crown to refer Indian and Colonial appeals to the Court of Appeal constituted under the Act of 1873; and it would seem very desirable, if and when any such change as that suggested should be made, to add those members of the Judicial Committee of the Privy Council who are not peers to the judicial strength of the House of Lords.

The constitution of this 'Imperial' Court of Appeal, for so it was intended to have called that of 1873, would then be as follows:—

The Lord Chancellor, President	1
The <i>ex officio</i> members of the Court of Appeal, the Master of the Rolls, the Lord Chief Justice, and the President of the P. D. and A. Division	3
Lord Justices	5
Lords of Appeal, in ordinary	4
Lords of Appeal	5
Judicial Committee (possibly also four salaried Colonial and Indian Law Lords)	5

There would thus be a judicial staff in the Upper House of twenty-three or twenty-seven distinguished Judges, in whom, as a final appellate tribunal, the empire would have the profoundest confidence. Some of the Lords of Appeal might not be able to undertake work for the whole year, but it is likely that all of them would be able to arrange to attend for a term or more in each year. Twenty Judges, however, would at least always be available.

The number above mentioned might be increased from time to time in this way. It occasionally happens that a Judge after fifteen years' service desires, although still in full bodily and mental vigour, to escape from the daily routine of business at the Royal Courts: he wants a little more ease and leisure, without breaking entirely with the habits of his life. At present he has no

option but to retire on his pension. But if it were open to the Lord Chancellor to invite such a one to the House of Lords as a 'Lord of Appeal,' the country might occasionally get the service of an experienced Judge at no further cost, and the Judge would find an occupation congenial to his taste and not too onerous for his strength.

The following are some of the incidental advantages which might be reasonably expected to result from a final Court of Appeal thus constituted. The members of this Court being numerous, and having, as it seems likely they would have, considerable leisure, would be able to give assistance to any branch of the Court of Appeal which needed it, and possibly in time of pressure some of its members might assist the Judges of Assize or of the High Court; the final appellate tribunal could never be weaker than that from which the appeal is brought—a state of things which at present sometimes happens; and in cases of importance a large body of Judges would be available for hearing or rehearing the matter *in banc*.

It is not possible in the space available to go into detail, but a few points may be glanced at. The procedure of such a Court should be as simple and cheap as possible, and possibly the practice in the present Court of Appeal, so simple and satisfactory, might be allowed to supersede the deposit of £200, the forty copies of each case and appendix, ten bound in purple cloth, the appendices, which 'sometimes equal the bulk of Liddell and Scott,' and the scale of fees, all of which things so admirably illustrate Mr. Birrell's pregnant saying that, 'there has never been but one Mistress of the English Law, and her name is "Aurea Praxis."' The course of business would continue much as it does at present. Six 'Lords of Appeal' would sit in the Royal Courts in the Strand, as the Lord Justices now sit. A third Court would be perhaps constituted, which might take appeals now taken by Divisional Courts. Scottish and Irish, Indian and Colonial appeals, and appeals from Consular Courts and the Channel Islands, would no doubt continue to be heard by the same Judges and, for a time, in the same place as now. As to ecclesiastical appeals, it may be remembered that Lord Selborne was greatly pressed to include them in the appeals to be disposed of by his Court of Appeal. 'It would be,' it was said, 'the greatest conceivable gift to the Church.' Perhaps, if the same view is still held, effect might be given to it. The High Court would, according to the scheme suggested, lose the services of the Lord Chief Justice and the President of P. D. and A. Division; but it would be very desirable that the services of the former as a criminal Judge should not be lost, and the ancient title of L. C. J. should be retained. As to the work to be done. It seems

(see Civil Judicial Statistics for 1897, by John Macdonell, Esq., C.B., LL.D.) that the annual average number of appeals of all kinds heard and determined for the years 1893-7 was, in the Privy Council about 56; in the House of Lords, 48; in the Court of Appeal, 522; making in all 626. From this, the English appeals to the House of Lords, about 40, would have to be deducted, but appeals which now go to Divisional Courts would require to be added, the average being about 298, thus making a total of 884 appeals of all kinds. Supposing five Courts to be sitting, this would give about 177 appeals to each Court, for the hearing of which two hundred days would suffice. If three Judges sat in each Court, there would be a force in reserve of seven or more Judges.

The reform advocated under this and the preceding heading is the logical result of the principles laid down in 1873-6, and if carried out would be the 'crowning of the edifice,' the foundations of which were then laid. It is simple, and its adoption need not cause any interruption of business nor any interference with 'interests.' It is conservative, being indeed merely a modification, to suit the requirement of the times, of the principles upon which the Justices Itinerant and the Concilium Regis were founded. That it would secure to the country a most dignified and efficient Supreme Court of Justice is beyond question; and the cost of it would be nothing, for no extra salary, unless four salaried Colonial Law and Indian Lords should be appointed, and no increase of existing salaries would be required, for the services of peers in the position of Lord James of Hereford and of Lord Brampton, and of retired Judges like Sir Ford North are in effect gratuitously given.

Since this article was written, suggestions have been made and measures, it is believed, are being taken for strengthening the Privy Council and uniting it with the House of Lords as one tribunal under the title of the 'Imperial Court of Appeal.' It is curious to observe that the very name is adopted which was suggested in 1873 for the tribunal which, it was hoped, would put an end for ever to 'the expense and delay incident to double (now possibly treble) appeals.' 'The opinion which creates law' is, as Professor Dicey has recently said, an opinion 'formed thirty or forty years ago, and put into force by men of to-day.' This gives some ground for the hope that in the near future the views which were so strongly held and so vigorously supported both by the lawyers and statesmen of thirty years since may find expression in the Statute Book.

THOMAS SNOW.

CONSIDERATION AND THE ASSIGNMENT OF CHoses IN ACTION.

WHAT (or, rather, when) is a *chose in action*? What is the distinction between a legal and an equitable *chose in action*? How may *choses in action* be assigned? What *choses in action* may be assigned? These are questions which the Judicature Act has done more to raise than to solve. Here I propose to deal only with one point concerning the assignment of *choses in action*.

It is stated, with more or less of directness and breadth, in text-books of repute, that a Consideration is necessary to the validity of an assignment of a *chose in action*. One distinguished author states the doctrine without qualification, on two occasions. Speaking of the assignment of ordinary contractual rights, and contrasting it with the transfer of a negotiable instrument, Sir William Anson says: 'in the case of an ordinary contract, *D*' (the assignee) 'would be called upon to show that he had given consideration to *A*' (the assignor) 'for the assignment ¹.' It is true that, in another passage, the Warden of All Souls points out the equitable origin of the doctrine ²; but he treats it as incorporated into the Judicature Act, and, therefore, as of general application ³. Snell propounds the rule with almost equal breadth ⁴. Leake, though he confines himself to equitable assignments, apparently commits himself to a similar doctrine: 'The Court of Chancery, in the exercise of equitable jurisdiction, treated the assignment of a legal *chose in action* as importing an agreement that the assignee should use the name of the assignor in proceedings at law to realize the *chose in action*; which agreement, *if supported by valuable consideration* ⁵, the Court would specifically enforce ⁶.' Mr. Blake Odgers, in his recent article in the *Encyclopedia of the Laws of England* ⁷, whilst admitting that assignments falling within the twenty-fifth section of the Judicature Act are valid without consideration, emphatically asserts that 'it was essential to the validity of an equitable assignment before the Act (and it still remains essential in all cases not within this section) that the assignment should be for valuable consideration.'

¹ Contract (9th ed.), p. 250.

² *Ibid.*, p. 245.

³ The italics are the writer's.

⁴ Vol. i. p. 356.

⁵ *Ibid.*, p. 243.

⁶ Equity (12th ed.), p. 85.

⁷ Law of Contracts (2nd ed.), p. 997.

The statements of Story¹ and Smith², though not free from ambiguity, lean in the same direction.

It is evident, therefore, that the doctrine has much theoretical authority, although one or two eminent writers are significantly silent on the subject³. Moreover, the doctrine is of good age. Fonblanque, in his notes to the anonymous treatise on Equity edited by him, asserts that 'interests in contingency, respecting personal estates, are assignable in equity; but it may be material to observe that, in case of assignments of such interests, Equity requires the assignee to show that he gave valuable consideration for the interest assigned, and therefore will not interpose to assist volunteers⁴.' There are even *dicta* of very eminent Equity judges which, if they were not easily capable of a different explanation, would go far to support the doctrine. Thus Lord Keeper Bridgman is reported to have said, in an anonymous case of 1676, that he 'would not protect a voluntary assignment of a *chose in action*⁵.' And Lord Hardwicke, in two reports of 1741⁶ and 1742⁷, is credited with similar expressions. Against these expressions, however, must be set the remarkable statement of so careful a reporter as Peere Williams, in a case of 1733⁸, that 'it was admitted on all sides, that if a man in his own right be entitled to a bond, or other *chose in action*, he may assign it without any consideration.' And, though there may be some excuse for the doctrine, there is, as I shall hope to show, no justification. For, upon examination, it appears that not one single case which is relied upon in support of the doctrine will bear it out; further, that there are several unshaken decisions absolutely inconsistent with it.

Looked at from the point of view of principle, the doctrine is strange; for, as is now very well known, the requirement of Consideration took its rise in the evolution of the simple contract, and had nothing to do with assignment or transfer. So far as interests in land are concerned, they have been freely transferable without Consideration ever since *Quia Emptores*; and, although *chooses in action* relating to land were long deemed to be inalienable, the relaxation of this rule was gradually effected by statutes which said not one word about Consideration⁹. Leake, with his usual caution, saw this difficulty; and, as we have seen, in the passage quoted from his book, invented an elaborate explanation to bring the doctrine

¹ Equity Jurisprudence (2nd Eng. ed.), p. 691.

² Principles of Equity (2nd ed.), p. 334.

³ e. g. Fry, Specific Performance; Pollock, Contract; Williams, Personal Property.

⁴ Equity (5th ed.), p. 215 n.

⁵ Freeman, Ch. Ca. p. 145.

⁶ *Bates v. Dandy*, 2 Atk. p. 207.

⁷ *Jewin v. Vobe*, *ibid.*, p. 417.

⁸ *Lord Carteret v. Paschal*, 3 P. Wms. 199.

⁹ e. g. the Wills Act, §§ 1, 3; Real Property Act, 1845, § 6; Conveyancing Act, 1881, § 50 (1).

within the region of contract. But his argument contains a fatal flaw. The chief point of the equitable assignment was, that it enabled the assignee to sue in *his own name*. Doubtless Equity (no less than Law) has recognized that a voluntary assignment must, in many cases, give way to a subsequent claim of better foundation. But that is not the point. The point is, whether, as between the parties to it and the person liable, an assignment of a *chose in action* must be founded on valuable Consideration.

Now the *onus probandi* rests, I maintain, upon those who assert the affirmative. Even if it were the fact (which it is not) that no reported decision could be shown, which necessarily involved the approval of a voluntary assignment, this fact would be quite consistent with the correctness of voluntary assignments. It would merely show that no reporter had thought it necessary to report a case which involved no departure from principle. It would be quite sufficient to take the cases relied upon by the supporters of the doctrine here impugned, and to show that they did not bear out the proposition. But the advocate of a good cause can afford to be generous; and it will, perhaps, be shorter and more convincing to show, first, that voluntary assignments of *choses in action* have in fact been supported by Courts of Equity, and then to suggest briefly the excuses for the contrary proposition.

And first, with regard to assignments under the Judicature Act. The two cases of *Harding v. Harding*¹ and *Walker v. The Bradford Old Bank*² seem quite conclusive against the view that these require a Consideration. In the former case, the plaintiff sued in Q. B. D. to recover a sum of money due to her father as a residuary legatee under a will, of which the defendants were executors and trustees. The sum had been admitted by the defendants in an account stated. It was therefore a legal *chose in action*. The assignment by her father, under which the plaintiff claimed, was a mere order addressed to the defendants, and no Consideration was given for it. The defendants took the objection of want of Consideration, and were overruled. In the latter case, the assignor by voluntary deed assigned to the plaintiff all moneys then or thereafter to be standing to his credit in the books of the defendant bank. No notice of the assignment was given to the bank until after the assignor's decease, at which time his balance was £217. The assignee brought an action to recover the amount, and the bank raised the defence of want of Consideration. But the defence was decisively overruled. After these two cases, it is hardly possible to argue that an assignment, otherwise valid under the Judicature

¹ (1886) 17 Q. B. D. 442.

² (1884) 12 Q. B. D. 511.

Act, requires a Consideration. It need hardly be pointed out that the Act itself contains no word of the doctrine¹.

But we pass to decisions of Courts of Equity. In *Lambe v. Orton*², decided by V.-C. Kindersley in 1860, one of the next of kin voluntarily directed payment of his share in the residuary estate of a deceased person to *A*, *B*, and *C*. The representatives of the assignor, after his decease, tried to upset the assignment; but it was upheld by the Court. This case would be quite conclusive, but for the fact that it is the custom to speak of and, sometimes, to legislate for an executor as though he were a trustee, and to treat an unpaid share of a next of kin as an equitable interest. It may be an equitable interest; but surely it is also a *chose in action*? However, the point need not be laboured. We pass to cases to which, it is conceived, no possible objection can be taken.

In *Fortescue v. Barnett*³ the defendant assigned a policy of insurance by a voluntary deed to the plaintiff, and retained the policy in his own possession. No notice was given to the insurance company; and the latter, acting in ignorance of the assignment, paid bonus and surrender value to the assignor. At the suit of the assignee, the assignor was ordered to replace the value of the security. In the almost contemporary case of *Bill v. Cureton*⁴, an unmarried lady assigned a sum of stock to trustees, upon a purely voluntary settlement. Afterwards, and before any claims under the instrument (except her own) had come into existence, she claimed to revoke the settlement, *on the ground that it was voluntary*. Her claim was disallowed by Sir C. Pepys.

If further proof be needed, we may turn to the well-known decision in *ex parte Pye*⁵. There the testator had directed an agent in Paris to purchase a personal annuity in the name of *X*. The agent, disobeying his instructions, purchased the annuity in the name of the testator. The latter then sent over a power of attorney to his agent, bidding him at once to transfer the annuity to *X*. He did so, but, before he effected the transfer, the testator died. Having ascertained that, by French law, the acts of an attorney, done in bona fide ignorance of his principal's death, were valid, Lord Eldon upheld the assignment, for which there was, of course, no Consideration, as there had been none for the original gift of the testator. The case is often referred to as an authority for the proposition, that where a man has, by a voluntary act, constituted himself a trustee, he will not be allowed to revoke his act. But there was really, as will have been seen, no question of trusteeship at all. If,

¹ This fact is pointed out by Sir W. Anson in the last (9th) edition of his book (p. 246).

² 1 Dr. & Sm. 125. ³ (1834) 3 My. & K. 36, 41 R. R. 5 (Sir John Leach M.R.).

⁴ (1835) 2 My. & K. 503, 39 R. R. 258. ⁵ (1811) 18 Ves. 140, 11 R. R. 173.

after the purchase had been effected in his name, the testator had chosen to appropriate the annuity, he could have done so. He preferred to assign it; and his assignment was declared binding by the most cautious of Chancery judges.

In making this first selection of cases, I have taken care to avoid quoting those in which the subject-matter of the assignment was in the nature of an equitable interest. And yet, an equitable interest—e. g. the interest of a beneficiary in stock standing in the name of a trustee—is very like an equitable *chose in action*. It cannot be enforced without proceedings against the trustee, which, at any rate before the Judicature Act, could only be brought in a Court of Equity. And the best proof that this view is correct is to be found in the fact that attempts to extend the doctrine of Consideration to this class of cases have been made—and overruled. In *Kekewich v. Manning*¹, decided in 1851, Lord Justice Knight Bruce said:—

‘Suppose stock or money to be legally vested in *A*, as a trustee for *B* for life, and, subject to *B*’s interest, for *C* absolutely; surely it must be competent for *C*, in *B*’s lifetime, with or without the consent of *A*, to make an effectual gift of *C*’s interest to *D* by way of mere bounty. . . . If so, can *C* do this better or more effectually than by executing an assignment to *D*?’

The question of the Lord Justice still awaits an answer; and, meanwhile, his decision in *Kekewich v. Manning* has been acted upon by Vice-Chancellor Wood in *Donaldson v. Donaldson*², and referred to with approval in other cases³. But, indeed, *Kekewich v. Manning* laid down no new rule. For at least two hundred years Courts of Equity have recognized as valid, voluntary assignments of equitable interests, both in land and in personalty. To quote only a few cases, it suffices to mention *Warmestrey v. Tanfield*⁴ (contingent executory interest in a term of an advowson), *Veizey v. Pinwell*⁵ (devise of an equitable interest in a term), *Goring v. Bickerstaffe*⁶ (assignment of a future interest in a term), *Thomas v. Freeman*⁷ (the like), *Wind v. Jekyl*⁸ (devise of a similar contingent interest), *Higden v. Williamson*⁹ (interest in an estate devised on trust for sale), *Wright v. Wright*¹⁰ (assignment of a contingent interest under a devise), *Petre v. Espinasse*¹¹ (voluntary assignment of share of intestate’s estate upheld against assignor himself), *Nelthorpe v. Holgate*¹²

¹ De G. M. & G. 176.

² (1854) Kay, 711.

³ e. g. *Richardson v. Richardson* (1867) L. R. 3 Eq. 692; *Pensfold v. Mould* (1867) L. R. 4 Eq. 564, &c.

⁴ (1628) 1 Reports in Chancery, 16 (Lord Coventry and the judges).

⁵ (1640) Pollexfen, 44 (Lord Keeper Finch).

⁶ (1663) Pollexfen, 31.

⁷ (1706) 2 Vern. 563 (Lord Cowper).

⁸ (1719) 1 P. Wms. 572.

⁹ (1732) 3 P. Wms. 132.

¹⁰ (1749) 1 Ves. Sr. 408.

¹¹ (1834) 2 My. & K. 496, 39 R. R. 254.

¹² (1844) 1 Coll. 203.

(assignment of contract to purchase land), *Dowell v. Dew*¹ (assignment of contract to grant a lease).

In the face of this array of authority, it is, perhaps, only a question of pathological interest—how the doctrine arose? But pathological studies are often valuable. And, on investigation, it will be found that there are two rules of Equity, either of which, or both together, might lead to the conclusion, that a Consideration is necessary in equity to the assignment of a *chose in action*. And it is, probably, from want of attention to the exact limits of these rules that the doctrine has arisen.

(1) A voluntary assignment of a *chose in action* cannot prevail against a person with a better claim. This rule, which seems to have been borrowed from the well-known statute of 1584 (or, rather, from the construction placed upon it), was first introduced, it would seem, to prevent the assignment by a husband of his wife's equitable *chooses in action* defeating her equity to a settlement. This is the simple explanation of such cases as *Jacobson v. Williamson*², *Bates v. Dandy*³, and *Jewin v. Vobe*⁴, often quoted in support of the main doctrine. And it is conceivable (though the writer is not aware of any decision to that effect) that this rule might be extended to cases of voluntary assignments of *chooses in action* in favour of subsequent purchasers for value. But it is noteworthy that the Courts have refused to apply it to voluntary assignments of equitable interests in stock, even though reversionary⁵. No doubt voluntary assignments of *chooses in action* may be set aside by creditors under the 13 Eliz. c. 5⁶; but again it is noteworthy, that the Court refused to apply the rule, until the passing of the 1 & 2 Vict. c. 110 brought securities for money within the scope of goods seizable in execution⁷. Presumably, also, a voluntary assignment of *chooses in action* would be impeachable under section 47 of the Bankruptcy Act, 1883.

(2) Equity will not lend its aid to complete an imperfect attempt at assignment where there is no Consideration. This, I strongly suspect, is the true stone of stumbling. The rule is sometimes stated in loose fashion thus: 'Equity will not aid a volunteer.' How misleading this statement of the rule may be can be readily gathered from the case of *Fletcher v. Fletcher*⁸, where the Court of Chancery enforced, against the representatives of an obligor, a purely voluntary bond, found in his possession on his decease, though it had

¹ (1842) 1 Y. & C. C. C. 345.

² (1717) 1 P. Wms. 382.

³ (1741) 2 Atk. 207.

⁴ (1742) *ibid.*, 417.

⁵ *Jones v. Croucher* (1821) 1 Sim. & S. 315.

⁶ (1861) *Stokoe v. Cowan*, 29 Beav. 637.

⁷ *Dundas v. Duns* (1790) 1 Ves. J. 196, 1 R. R. 112; *Sims v. Thomas* (1840) 12 A. & E. 536. This was a decision of a Court of Law.

⁸ (1844) 4 Ha. 67.

never been communicated to the obligees, and though the obligor had attempted to revoke it by his will. If that is not 'aiding volunteers,' it is difficult to see what is. In that case, however, Shadwell V.-C. stated clearly the true rule. 'A Court of Equity will not, in favour of a volunteer, give to a deed any effect beyond what the law will give to it.' That is the point. A Court of Equity will not lend its aid to complete a voluntary assignment of an imperfect character, because to do so would virtually be to annul the rule of law, that every simple contract requires a Consideration to support it. An imperfect assignment can only be treated as a contract to assign, and a contract to assign requires a Consideration. The only peculiarity in the equitable application of the rule is that, even where the imperfect assignment has been made by deed, Equity still declines to enforce it. But this is because Equity always refused to decree specific performance of a voluntary contract, even though under seal; and, until recently, Equity could not award damages. This explanation at once gets rid, not only of the older cases, such as *Row v. Dawson*¹ and *Whitfield v. Fauset*², quoted in support of the doctrine, but also explains the modern cases of *Milroy v. Lord*³, *Warriner v. Rogers*⁴, *Heartley v. Nicholson*⁵, *re Breton's Estate*⁶, and *Hardinge v. Cobden*⁷. If these cases be examined, it will at once be evident that the whole point in each of them was, that the alleged assignment was wanting in the essential of completeness—in other words, that it was not an assignment at all, but a promise to assign. And the decision of Lord Romilly, in *Morgan v. Malleison*⁸, that even such an imperfect assignment is enforceable, is now universally condemned⁹. But that this doctrine does not extend to completed assignments is clear, both from the decision and the emphatic words of Lord Eldon in *Ellison v. Ellison*¹⁰:—

'I take the distinction to be, that if you want the assistance of the Court to constitute you *cestui que trust*, and the instrument is voluntary, you shall not have that assistance for the purpose of constituting you *cestui que trust*; as upon a covenant to transfer stock, &c., if it rests in covenant, the Court will not execute that voluntary covenant: but if the party has completely transferred stock, &c., though it is voluntary, yet, the legal conveyance being effectually made, the equitable interest will be enforced by this Court.'

¹ (1749) 1 Ves. Sr. 331.

² (1862) 4 De G. F. & J. 264.

³ (1875) L. R. 19 Eq. 233.

⁴ (1890) 45 Ch. D. 470.

⁵ *re Warriner v. Rogers*, L. R. 16 Eq., at p. 348; *Richards v. Dellbridge* (1874) L. R. 18 Eq. at p. 15.

¹⁰ (1802) 6 Ves. 656, 6 R. R. 19.

² (1750) *ibid.*, 387.

⁴ (1873) L. R. 16 Eq. 340.

⁵ (1881) 17 Ch. D. 416.

⁶ (1870) L. R. 10 Eq. 475.

Finally, it may be pointed out that the subject is sometimes confused by the introduction of a class of cases which really turn on another point. If a settlement or disposition is made by a person wholly for his own benefit, Equity will allow him to revoke it, at any rate if he is of full age and capacity. This is the explanation of such cases as *Beatson v. Beatson*¹, *Morrell v. Wootten*², and *Paul v. Paul*³; and, inasmuch as such dispositions are naturally of a voluntary character (for who would pay money to be allowed to act as a trustee?), there has been a tendency to treat them as supporting the main doctrine. But the strict limits placed by the Court even upon such revocations are apparent from the case of *Bill v. Cureton*⁴, quoted above. There the Court refused to allow a lady to revoke a voluntary assignment, not made in contemplation of marriage, for the benefit of herself and any husband and children she might afterwards have. And these cases do not really illustrate the doctrine at all.

The net result of this inquiry may be summed up thus:—

Equity does not, and never did, require a Consideration for the validity of the assignment of a *chose in action*; but,

(a) Voluntary assignees of *chooses in action* may be postponed (at any rate where their titles are not protected by the Judicature Act) to subsequent acquirers with a better claim; and,

(β) An imperfect assignment of a *chose in action* will not be completed by the Court at the suit of a volunteer.

EDWARD JENKS.

¹ (1841) 12 Sim. 281.

² (1880) 15 Ch. D. 580.

³ (1852) 16 Beav. 197.

⁴ (1835) 2 My. & K. 503, 39 R.R. 258.

[With regard to the passage quoted from that extremely accurate writer the late Mr. Leake, I must confess that I see nothing to criticize. He is speaking of the *specific enforcement* of an implied agreement, and no Court of Equity would ever specifically enforce a merely voluntary undertaking, whether express or implied, and whether arising out of the assignment of a *chose in action* or any other transaction.—ED.]

THE GROWTH AND DEVELOPMENT OF INTERNATIONAL LAW IN AFRICA.

THE explorations undertaken by travellers in Africa have within the last thirty years opened to European nations the interior of the continent. Livingstone, Burton, Speke, and Stanley led the way. The discovery of wide waterways traversing lands thickly peopled, and productive of valuable commodities, changed entirely the positions of those nations which occupied or had influence over the territories contiguous to the regions which had hitherto been untrodden by the feet of white men.

Those Powers who had historical or other claims in Africa bestirred themselves. Others pushed forward to obtain a foothold in these new regions. The claims accruing from occupation or discovery were fortified by treaties with native chiefs or the proclamation of Protectorates. In such a state of circumstances it became necessary for the nations chiefly concerned with Africa to adjust their relations one with another. The operations of a company called the International Association of the Congo in the watershed of the River Congo, which had been discovered and explored by Stanley, were of an extensive and important nature. The Association signed treaties with native chiefs, accepted cessions of territory, and rapidly developed its authority. Under the direction of the King of the Belgians, it had become a factor of importance, and one to be taken into account in the decision of African questions, since its sphere of operations spread over the watershed of the wide Congo river whose tributaries take their rise in the great lakes of the east. Its status was that of a company operating in the newly-discovered regions, subject to the laws of Belgium, but possessing no international entity, and unrecognized diplomatically by other nations. Upon the invitation of the German Emperor a Conference of the Powers was held at Berlin in 1885, for the purpose of regulating 'in a spirit of good and mutual accord the conditions most favourable to the development of trade and civilization in certain regions of Africa, and of assuring to all nations the advantages of free navigation on the two chief rivers of Africa flowing into the Atlantic Ocean, and of obviating the misunderstanding and disputes which might in future arise from new acts of occupation on the coasts of Africa.'

I. The result of this conference was the signing of an Act known

as the General Act of the Conference of Berlin, 1885. This Act has, when taken in connexion with the General Act of the Conference held at Brussels in 1890 in relation to the slave trade, become material into which have been interwoven new theories of international law. By treaties, agreements, conventions, by discussions or diplomatic communications, and also by the treatises of international lawyers upon points of doubtful interpretation, an adaptation of the well-established principles of international law to the changing circumstances of the development of Africa is gradually being brought about.

II. The questions that might arise as to new acts of possession (prises de possession) were dealt with by Article XXXIV of the Act of 1885. Not only those Powers which already held possession of tracts of land on the coasts of Africa, but also those which might in future acquire them, were subject to its provisions. A new act of possession, as well as the assumption of a Protectorate, required due notification to the Signatory Powers, so that they might, if need be, make good any claims of their own.

If these formalities were complied with, the validity of the acts became unimpeachable, so far as the Signatory Powers were concerned, and, as all Governments of any importance were represented at the Conference, the notification might be said to be good against the civilized world.

Protocols.

No rules for the occupation of new territories were laid down by the Conference. The question was thought a delicate one, but certain principles were enunciated, upon which the occupying Powers should act. Obligations were imposed insuring the establishment of authority in the regions occupied, sufficient to protect existing rights, and to maintain the freedom of trade and transit.

Article
XXIV.

'Existing rights' refer not merely to the rights possessed by incomers, foreigners to the native states, which they might have obtained by grant from the native chief, but also to those territorial rights of usage and custom which the occupying Power would recognize and not destroy. Where the native state was one of a comparatively highly organized nature, the act of occupation would, under the Berlin Act, be in form a 'prise de possession,' in character rather the assumption of a Protectorate. The Powers, however, confined the duty of establishing authority to acts of occupation only, leaving Protectorates unaffected by the obligation, but subject to the notification which would define the limits and the extent of the Protectorate.

The effect of the two articles taken together was to substitute for effective occupation the notification to the Powers, and to give their assent the force of law. From the moment of the

acknowledgement of the receipt of the notification, and its recognition by all the signatories, the district would pass into the possession of the notifying Power, and the responsibilities attaching to such possession would be assumed forthwith.

The right of occupation was not based upon treaty, cession, conquest, or discovery, nor upon the ground of the country being derelict or *territorium nullius*, but rather upon a right sanctioned by civilized nations *inter se* and affirmed by treaty. The recognition of a State existing within the uncivilized region, which was the subject of the new accession of territory, would to a certain extent nullify the objects aimed at, viz. the avoidance of misunderstanding and disputes which might in future arise from new acts of occupation. A fruitful source of contention might flow from the struggle to obtain the consent of some powerful chief to cede his territories to one Power, or the other, if the right to occupy or protect his tribal possessions rested solely upon the priority of the treaty or the sufficiency of his consent.

It was, moreover, desirable that the occupation as such should be effective, and that the occupier should within a reasonable interval manifest a wish or a power to exercise his rights within the region occupied, and to fulfil the duties which such occupation entails.

The rights of sovereignty which accrue from occupation and from the assumption of a protectorate were not placed upon the same footing; in the one case an obligation to ensure the establishment of authority was imposed upon the occupying Power, in the other, beyond the duties which are implied by the term Protectorate, no further responsibilities were incurred. It would appear, therefore, that the Signatory Powers placed new acts of possession upon a higher plane than the mere proclamation of a Protectorate. Effective occupation would lead up to territorial sovereignty; a Protectorate would imply 'une sorte de conquête morale précédant et justifiant par la suite la conquête matérielle,' which might or might not develop into absolute annexation.

It must be noted that both new acts of possession and also the declaration of a Protectorate are subject to the notification under Article XXXIV, although the Conference did not impose the same obligations upon a protecting as upon an occupying Power. Professor Westlake and Mr. Hall are of opinion that the effect of the proclamation of a Protectorate on the coasts of Africa carries with it an obligation of establishing authority equal to that laid down in Article XXXV, and that the meaning of the Berlin Act is rendered clear by the emphatic declaration of the Brussels Act, that the most effective means for counteracting the slave trade in the interior of

Protocols,
Jan. 31,
1885,
S. P. C.

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Annuaire
de l'Insti-
tut de
Droit
Inter-
national,
1887-9,
p. 183.
Westlake,
Inter-
national
Law, p.
138.

Despag-
net, Essai
sur les
Protecto-
rats, p. 234.
Protocols,
Berlin
Act, Nov.
15, 1884.

Despag-
net, p. 223.

Despag-
net.

Westlake,
Inter-
national
Law,
p. 181.
Hall,
Jurisdic-
tion of the
Crown,
p. 214.

Africa are by the progressive administration and judicial organization of territories placed under the sovereignty or protectorate of civilized nations.

It will be seen that the line which separates occupation from protectorate is fine. A Protectorate must be an exclusive right as against all other nations, and the possession of that right brings with it the corresponding duty of establishing some form of government for the protection of its own subjects and those of foreign nations. As Professor Westlake remarks:—

Westlake,
Inter-
national
Law,
p. 181.

‘If the exclusive character of a Protectorate is admitted, surely it follows that the government required by the conditions of the region must be supplied by the State which excludes all others from supplying it, and that that State is armed by all others which recognize its protectorate with their consent to its exercise of jurisdiction, indispensable for the purpose, over their subjects within the recognized area.’

The practical effect of Articles XXXIV and XXXV has been to allow acts of occupation to fall into desuetude. Civilized nations could obtain all the powers they required, both on the coast and in the interior, by the proclamation of a Protectorate, so that it has become, as Despagnet suggests, a variant in the procedure laid down by the Conference of Berlin. ‘Prises de possession’ and protectorates have in the course of the last fifteen years become almost alike in their operation.

III. The principle of the free navigation of rivers and waterways separating or traversing several States had been laid down from the date of the Congress of Vienna, 1815, and applied since then to certain rivers of Europe and America by the treaties of Paris, Berlin (1818), and London (1871-83). But until recent years the establishment of this principle did not bring with it any suggestion of the abolition of import duties or the diminution of customs. Free transit for all ships, subject only to navigation dues, was the extent of the privileges granted to foreign traders.

The economic theory that universal freedom of trade benefits mankind materially and socially found no support in these treaties. But the Berlin Conference has extended the scope of the earlier treaties and conventions. It has declared that freedom of trade in its modern meaning exists in the basin of the Congo, its embouchures and circumjacent regions. In addition to affirming the free navigation of the rivers Niger and Congo, it has mapped out and defined a free trade zone extending across Africa between parallels of latitude 6° north to 18° south. By the Signatory Powers these provisions are recognized henceforth as part of international law, so that the theory of free trade, though not regarded by the vast

majority of European States as worthy of acceptance, has by the General Act been imposed upon Central Africa. Article XIII.

The explanation need not be far to seek. Although Great Britain was deeply concerned in the deliberations of the Conference, her voice was not preponderant, and the knowledge of her attachment to free trade would hardly have been of avail to carry with her the votes of the delegates; but the closing to foreign trade of the vast territories adjacent to the Congo might have been the result of the admittance into the international society of the Congo Free State. It was, therefore, for the advantage of all the Signatory Powers that equal opportunity of trade and transit should be given to each. The grant of free imports under certain conditions was the price paid for the recognition of the State and the guarantee of its neutrality.

The admission of a new State into the international family upon these terms has given an international sanction to the doctrines of free trade within the regions and limits defined by the Conference of Berlin.

IV. Five years after the signing of the Berlin Act, the Powers again conferred upon African matters. The best means for suppressing the traffic in slaves was the subject of their deliberations. The rights given by the Berlin Act of declaring protectorates or taking possession of districts adjacent to the coasts had been largely taken advantage of during the years that had elapsed. It was, therefore, a favourable moment for concerted action. The Powers most concerned and most solicitous to put an end to the cruelties which had been perpetrated upon the African natives had, by the efforts of traders and missionary pioneers, obtained a firmer footing within the districts that had fallen beneath their sway. Some authority was felt, some rudimentary administration had been set up, the influence of European Powers had extended, so that it was possible that the decisions at which the Conference arrived could be carried out. Slave routes in the interior were more successfully blocked, whilst a more stringent watch was kept upon the coast-line to stop the traffic across the sea. Brussels Act, 1890.

V. The Powers declared that the most effective method for counteracting the slave trade in the interior of Africa was the progressive organization of the administrative, judicial, religious and military services in the African territories placed under the sovereignty or protectorate of civilized nations. Article I, Brussels Act.

Although the whole of Africa had not at the time of the signing of the Act been apportioned out amongst European nations, sufficient progress had been made under Article XXXIV of the Act of 1885 to indicate the regions which were likely to fall under the

Article II. influence or into the possession of the several States. It was, therefore, laid down that the Power responsible in each territory should gradually establish in the interior strongly occupied stations in such a way as to make their repressive action most effectively felt; that they should, by constructing roads and by establishing telegraphic lines and means of communication, assure the security of the roadways. In addition to the main duty of repressing the slave trade, these stations or forts, and the cruisers placed in the inland waters, were to serve as places of refuge from the slave-hunters for the native populations placed under the sovereignty or the protectorate of the State to which the station belonged, and also as rallying points for independent nations who might from thence obtain assistance for their own defence.

The various protectorates which have been proclaimed over Africa do not fulfil all the conditions necessary in the strict definition of the term as it had hitherto been applied in Europe. A Protectorate has been defined as a State or community which has parted with freedom of action in foreign affairs. In international law such a state is semi-sovereign; it lacks full control over its foreign affairs, which are subject to the assent, approval, or control of the protecting State, but, had it not dispossessed itself of that control, it would be fully independent. The various protectorates claimed over Africa cannot be described as such. Their roots draw nourishment from a different soil; the peoples are for the most part barbarous or semi-civilized, and unacquainted with European ways. Some missionary or trader, or some emissary of civilization, some hunter of big game, penetrates into unknown and unmapped regions. He becomes friendly with the tribes with whom he comes in contact, and gains influence over them, and in a representative capacity obtains concessions and privileges from the chiefs. These may accrue for the benefit of commercial companies trading within the regions. They may take the form of treaties and agreements with European powers firmly attested by the thumb-marks and crosses of the unlettered chiefs. It may be that these treaties are signed by a direct representative of the European Government, and the chiefs and kings place themselves under the protection of that power, or, on the other hand, traders peacefully disposing of their wares may be ill-treated by the native rulers, and redress for their injuries be demanded by the State to which they belong. In that case, if military operations are undertaken, the native state may pass into the possession of its invader by conquest, or submit to the terms imposed upon it, which may take either the form of the proclamation of a Protectorate or the assumption of full territorial jurisdiction. The Berlin General Act rendered to a great extent

the signing of these treaties unnecessary. They served rather as proofs of the expansion of the State's influence commercially and politically amongst the tribes, and as a justification of the new acquisition, if objections should be made under the Berlin Act to the notification under Article XXXIV. But as Westlake observes in his *International Law* :—

'No document in which such natives are made to cede the sovereignty over any territory can be exhibited as an international title, although an arrangement with them, giving evidence that they have been treated with humanity and consideration, may be valuable as obviating possible objections to what would otherwise be a good international title to sovereignty.'

The principles, therefore, which are recognized in the relations between a protected and protecting State in civilized countries do not apply in the case of semi-barbarous tribes. Despagnet lays down the proposition that, instead of being limited to a tutelage over the protected State more or less marked, the protectorate of civilized States over those semi-civilized or barbarous becomes an establishment of sovereignty, and is thenceforward a colonial annexation of the Power which has established itself there.

This, though somewhat an extreme statement, describes the tendency of the effects which follow a declaration of Protectorate. It is a process in the expansion of those States which are compelled for the protection of their traders or from political necessity to enlarge their sphere of action. The position of the tribes within the Protectorate takes the form and likeness of that of civilized nations, subject, however, to the operation of the Berlin Act. Treaties are made with the protecting Powers. The right of succession of the chief, the maintenance and enforcement of the native laws and customs¹, the exercise of their religious ceremonies, and the possession of their property, and their national and tribal rights, are confirmed to the protected States, or remain unaffected by the proclamation of a Protectorate.

On the west coast of Africa, palavers held in the presence of the Governor or Administrator establish penalties, and give sanction to the native laws and define the limits of their jurisdiction. As far as possible, native law binding upon native subjects runs concurrently with the laws of the protecting State, which alone are binding upon British subjects and those under British jurisdiction, and are proclaimed by Orders in Council, or by the ordinances passed by the Legislative Councils within the Colonies to which the pro-

¹ Within the Gold Coast Colony the native chiefs sit as assessors in cases in which the general customary law or tribal customs are in question. See *Fanti Customary Laws*, J. S. Sarbah (Clowes & Sons, 1897).

tectorates upon the west coast of Africa are for the most part attached.

The West African tribes possess a genius for trade. They exhibit a keenness to ruin a rival trader by cutting off his markets or diverting the supply of his commodities, or by tolls and imposts, export and import, king's bar and custom bar, which would not discredit the more civilized inventions of *ad valorem* duties and high tariffs. Even their slave raids and man hunts are the outcome of a debased and perverted commercial instinct. Frequent tribal wars are the result of these rivalries; so that to prevent bloodshed, and to keep the peace, a reference of the disputes to an arbitrator appointed by the Governor is very frequently imposed upon the kings and chiefs who have entered into treaties or conventions with Her Majesty. These duties are performed by the Consuls or other officers employed in the service of the colony, who, from their administrative experience and knowledge of the local conditions, are best fitted for the work.

The procedure under the Berlin and Brussels Acts has been somewhat dissimilar upon the west and east coasts.

The west coast tribes have traded from time immemorial with Europe. Carthaginians, Portuguese, Dutch, English, French and Spanish, have all historical claims to have discovered or opened for trade some of its rivers or coasts: Senegal, Gambia, the Oil Rivers, Old Calabar, the Gold Coast, the Ivory Coast, the Slave Coast have been geographical names for centuries. Trade, whether it be in slaves or gold or spices, as formerly, or as now in oil and rubber and ivory, has always played the chief part in the intercourse between the civilized and uncivilized races.

It was the pushing of traders and merchants into distant markets in the interior, and the bringing of fresh commodities down to the coast, that drew under European influence those tribes whose homes were far up the rivers and remote from the sea. With the expansion of trade followed the law merchant, and with it the force necessary to suppress cheating and redress grievances. The tribal wars, after the over-sea slave traffic ceased, were more frequently those of rival trade communities than wars of conquest or pillage. It is perhaps true that a desire to indulge in the luxury of a feast upon an enemy in some cases may have prompted a negro tribe to engage in battle, or the religious fervour of the Moslem impelled him to the fray, but, generally speaking, commerce and not conquest was the motive which induced African chiefs to wage war upon one another. Jealousy, due to the fact that more profitable business was done by one chief than another, or disappointment that profits were diminished by merchants gaining access to the first producers,

were frequent causes of inter-tribal difficulties. But the closing of their rivers to strangers, or hatred of a foreigner, or a refusal to trade was practically unknown on the west coast. Interference with the slave trade was resented, as was likely in a country where domestic slaves were valuable property, but beyond that there seemed no obstacle to the extension of European influence into the interior. It was not, however, until comparatively recent years that the hinterland of the west coast was begun to be developed, or its tribes brought within the sphere of action of those European nations who were settled on the coasts.

But when once the exploitation of the west coast began, it proceeded apace, and by means of conquest, occupation, cession, and protectorate, from Cape Juby to the Cape of Good Hope, there now remains but little of the interior unappropriated, and few tribes unvisited and unknown.

On the east coast, on the other hand, few European nations could boast that they had established themselves in the interior, or possessed any but vague claims resting upon occupation or discovery, or on treaties with or cessions from mythical emperors or kings. The Sultans of Muscat and of Zanzibar reckoned the coast-line from below the island of Zanzibar northwards to Warsheikh to be under their authority. From Cape Delgado to Natal the King of Portugal was sovereign over the discoveries of the early navigators, the extent of which in the interior was ill defined, and had scarcely been reduced into possession by effective colonization. From Warsheikh northwards the coast-line was open to acts of occupation, of which advantage was taken by Italy, Great Britain, and France, under the Berlin Act, as far northwards as the territories under the suzerainty of the Sultan of Turkey.

With the exception of Natal, Cape Colony, and Mozambique, there were on that side no colonies which could afford a foothold from whence to advance into the interior, nor, save in the traffic in slaves and ivory, was there lucrative employment or scope for the trading instinct.

By possessing a market for slaves in the territories of the Sultans of Muscat, of Turkey, and Persia, the slave dealers absorbed all that there was of trade, and by their barbarities and devastations in the interior destroyed effectually inter-tribal traffic in native productions. With the stoppage of this iniquitous trade by the action of European States, and by their efforts to carry out the provisions of the Brussels Act, the east coast was gradually brought more closely under their control.

Treaties and conventions with the Sultan of Zanzibar formed the basis upon which extensive rights of protectorate and spheres

of influence in the interior were acquired by the British and German Governments. The means chiefly employed to carry out the objects of the Brussels Act in these regions were those indicated in Article IV, viz. the delegation of their rights and powers to Chartered Companies, which, though primarily formed for trading purposes, would assume the duties imposed by the General Act, and be entrusted with the progressive organization of the districts within which they operated.

Article IV,
Brussels
Act.

The Signatory Powers, however, emphasized the principle of international law that a State is responsible for its own acts and cannot contract itself out of its engagements by delegating its authority to any corporate body.

Hertael's
Treaties,
vol. xvii,
p. 118.

The granting of charters was not confined to the east coast only, for a most successful trading company in the basin of the Niger had in 1886 various powers conferred on it. The Crown confirmed the cessions of territory and sovereign rights which it had obtained from various kings and chiefs, and empowered the company to hold, use, and enjoy these rights, interests, and authorities for its own purposes, but upon certain conditions. These conditions comprised, amongst others, the right of the Secretary of State to dissent from any of the dealings of the company with any foreign Power, the prohibition of a monopoly of trade, the performance of all the obligations undertaken by the Crown at the Berlin Conference, and the carrying out of any jurisdiction exercised within the companies' territories under the Foreign Jurisdiction Acts.

In the next year, 1887, all the territories subject to the government of the Royal Niger Company were placed under the protectorate of the Crown, and due notification under Article XXXIV of the Berlin Act was given to the Signatory Powers. This was followed by an Order in Council providing for the exercise of the Queen's jurisdiction within the Protectorate, known as the Africa Order, 1889. It contains a general law dealing with the constitution of the Courts, their general powers and procedure.

The company having successfully carried out the duties imposed upon it, in 1899 surrendered its charter, and the administration of its territories was formally assumed by the Crown.

Charters were granted in 1885 to the German East Africa Company by the German Emperor, and by the Crown to the Imperial British East Africa Company in 1888, and to the British South Africa Company in 1889. In form British charters follow that of the Niger Company for the most part, but terms suitable to the circumstances of the countries in which they operate are imposed in each case by the British Government.

With the exception of the British South Africa Company, none of the British Chartered Companies in Africa now exist.

The Imperial East Africa Company, owing to military difficulties, lack of trade, and failure of its resources, surrendered its charter, and the administration of its territories is undertaken by the Secretary of State for Foreign Affairs.

Where mining or trading can be carried on at a profit, there chartered companies are likely to succeed. But they have two duties to fulfil, the return of a satisfactory dividend to their shareholders, and the administration of the territories entrusted to them to the advantage of the natives within it. These duties are not incompatible, but experience has shown that they are difficult to perform. The companies defray the cost of the administration in return for the privileges they enjoy, but the responsibility for their action lies with the State which confers these privileges upon them. The law to be administered throughout their possessions is laid down for them by Orders in Council, but as far as the executive is concerned, they are unfettered. On the west coast the Royal Niger Company was a striking success; on the east coast all the companies, with the exception of the British South Africa Company (which is much shorn of its powers), have failed.

The British South Africa Company has had a chequered and turbulent existence, but operating in a district in which white men can live, and in the midst of a large population of natives, it has had opportunities of exhibiting the capacity of its directors and the adaptability of a chartered company to administer the region entrusted to it. They have worked out a scheme of civil administration which is a modification of the Government in a Crown Colony, substituting for the veto or approval of the Crown the assent or approval of the Company. The control of armed forces has, owing to recent events, been withdrawn from the Company, and is now, through the High Commissioner, under the direct control of the Crown. There is an Executive Council and a Legislative Council, some members of which are elected by voters who possess certain qualifications. The authority of the Crown is manifested by a resident commissioner, who is, *ex officio*, a member of both the Executive and Legislative Council, and, in addition, the nomination of the Administrator by the Company is subject to the approval of the Secretary of State. Civil and criminal law is administered according to the laws of Cape Colony, and appeals are heard by the Supreme Court of that colony, with appeal to the Judicial Committee of the Privy Council. The regulation and government of natives is under the control of a Secretary for

Southern
Rhodesian
Order in
Council,
London
Gazette,
1899,
P. 7675-

NATIVE AFFAIRS, appointed by native commissioners. The latter act as magistrates in all cases between natives, who can, however, appeal against their decisions. The native chiefs, who are appointed by the Administrator, have under them district headmen. Certain reserves have been set apart for the use of the natives.

The result of the grant of the charter, as far as regards South Africa, has been the establishment of a colony. The position of the native tribes has fallen from that of a treaty-making power to that of a conquered people. The lands they occupy as reserves, though assigned to them for their exclusive use, are the property of the Company, and they themselves, whilst still retaining the form of their tribal institutions, are British protected subjects.

The power of the Crown to exercise or delegate the powers of regulating trade or governing British subjects in foreign countries has been exercised from early times (Hakluyt, *English Travels*, vol. ii. 146-3 Jac. II. This prerogative, the discretionary power of the executive, rests in the Crown apart from Parliament, but to enforce it upon British subjects parliamentary sanction is required. The first of a series of Foreign Jurisdiction Acts, 5 & 7 Vict. c. 94 (1843), succeeded by 53 & 54 Vict. c. 37, declared that the Crown could hold, exercise, and enjoy any power and jurisdiction acquired in a foreign country by treaty, grant, usage, sufferance, or other lawful means, in the same and ample manner as if it had been acquired by cession or conquest.

The Queen exercises this power by Royal Proclamation under Orders in Council. Under the authority conferred by the Orders in Council, the High Commissioners of South Africa or Nigeria issue regulations, which are called Queen's Regulations, for peace, order, and good government, or for the securing the observance of any treaty. These have the force of law within the limits to which the various Orders apply. They relate to every branch of administration, to revenue, but taxes, sporting licenses, mail service, and stamp duties, or to township regulations, hire of porters, native labour, and the multifarious duties imposed upon municipal officials. They fulfil the legislative functions which ordinances made by the Council of a Crown Colony discharge. Binding as they are upon all persons within the protectorates, unless expressly excluded by the terms, they bring under the direct control of the Crown both the executive and legislative authorities.

There have been in Africa two sequences of events.

It may be said that on the west coast the expansion of trade has compelled the establishment of some form of administration, and

that law, civil and criminal, has followed the traders' footsteps; on the east coast administration has outstripped trade. The efforts of the missionary and the suppression of slavery have been the two civilizing agencies. European States have, as signatories of the Brussels Act, attempted to carry out the duties imposed upon them, either by delegation to chartered companies or by direct state action, whilst the endeavours of private citizens to evangelize the natives have largely assisted the work, and at the same time prepared the way for more effective administration. As soon as white people become numerous, the necessity at once arises to provide law for them. In civilized nations the law is already in operation. The Crown, when necessary, proclaims the law by Orders in Council binding upon all her subjects within the territorial limits in which the Order has force. If territorial sovereignty has been claimed by the Crown, the Order binds all persons, natives and foreigners alike. In fact, all who would be justiceable in any Court. But the Crown did not in the Order of 1889 advance so comprehensive a claim. The Order was confined to British subjects, to foreigners who submitted themselves to a Court, and to foreigners with respect to whom any State, king, chief or government, whose subjects and under whose protection they are, had agreed with Her Majesty for the exercise of the authority. African
Order in
Council,
1889.

Although the Berlin Conference took place in 1885, and this Order is dated 1889, yet the British Government hesitated to assume jurisdiction over foreigners in its protectorates. By the Order of 1892, however, the proposition which had been maintained by the majority of the signatories of the Berlin Act, viz. that the establishment of a protectorate carried with it the right of administering justice over the subjects of civilized States, was fully accepted.

By section 2 it was declared that where Her Majesty has declared any territory or place within the limits of the Africa Order in Council 1889 to be a protectorate, the Provisions of the Order shall extend to foreigners in the same manner as it does to British subjects, and all such foreigners shall be justiceable by the Courts constituted for the protectorate under the same conditions as British subjects.

Neither France nor Germany showed any reluctance to claim jurisdiction over all foreigners within their protectorates. By an Imperial Decree of 1888 it is declared that the Imperial authority may extend its jurisdiction over all persons irrespective of their nationality, and natives of the territory are placed upon the same footing as German subjects with regard to the right of flying the German flag. Foreigners settling within the jurisdiction may be State
Papers,
1888.

naturalized and become German subjects. The assumption of such extensive powers leaves but a narrow line to be passed to render them fully territorial, and to convert the protectorate into a colonial annexation.

France has assumed powers no less extensive over foreigners within her protectorates. She has accepted the Conventional rights conferred by the General Acts of Berlin and Brussels in the sense in which they were regarded by the majority of the signatories. In *L'Affaire Magny et autres* (Cour de Cassation, October, 27, 1893) the Court, in reversing the judgment of the Appeal Court of Réunion, which had declared its incompetency to try a British subject for murder committed in the protected island of Johanna, held that, if the French Resident had in his control all the powers of police for the repression of crime, it followed that he would have the right to judge all who committed criminal offences by French law. These rights of jurisdiction appear, apart from the authority of the General Acts, to be almost inherent in the executive of regions far removed from civilized States. Without them a weapon for the protection of subjects against the misdeeds of foreigners is taken from the armoury of the protecting State. But whatever danger may have been incurred from the want of full and complete jurisdiction has been averted by the Orders in Council of 1892-99, and Great Britain has now practically assumed the same position towards foreigners within her protectorates as that held by the other Powers concerned with Africa.

External sovereignty, as distinguished from internal sovereignty, has been hitherto for the most part the extent of the power the Crown has claimed over those under her protectorate; but the trend of events politically as well as internationally is toward a more stringent control over the protected nations: 'Protectorates ripen into sovereignty.'

Amongst a people who are mainly engaged in cultivating the soil, the laws which govern the tenure of land are the most important. Questions of difficulty are apt to arise. A negro on the west coast possesses in many tribes two descriptions of property, that which he has gained by his own exertions, which becomes his own chattels real or personal, and that which he shares in common with his house or family. The apportionment or expropriation of the house property rests with the king, who exercises his kingly privileges, in some cases of his 'mere motion,' in others in accordance with ancient custom. These rights fall to him as the personal representative of his predecessor, or are conferred upon him by his succession to his kingdom or the tribal

stool. The kings or chiefs may or may not have transferred their tribal rights by treaty. In the one case the right of eminent domain, or the dealing with the ancestral property, passes to the protecting power, in the other it rests partly in the chief and partly in the Crown, since his dealing with the movables and immovables of his people, if manifestly unjust, is liable to revision on appeal to the superior authority.

In East Africa, the keeping of herds and flocks occupies the people to a large extent. Wherever there are pasture lands there are found the cattle, sheep, and goats, which form the chief riches of the country. The king owns the best and most fruitful herds, and keeps and pastures them around his kraal; but amongst tribes of Zulu stock, in addition to their own cattle, the various tribal families tend certain royal kine and oxen for the service of the king. They enjoy the usufruct of these until they are required for a feast for warriors who accompany the king to the villages, or for other purposes. Since the tribal property consists chiefly of chattels, the theory of a special property in land is practically unknown. The wide range over which the cattle roam, and the ease with which a new village is palisaded and roofed, prevent the acquirement of an hereditary holding of the same spot. But the people are in no sense nomadic. The limits of their possessions are well known, though not strictly defined. The rude cultivation of cereals in the fields around the villages keeps up a form of village life. There is trade in pottery and basket ware and domestic utensils, industries which are generally found where milk and butter are staple products. But wealth is acquired by individuals chiefly by the possession of cattle or of slaves. The royal herds of which the members of the tribe have the use are, subject to the king's first claim upon them, regarded as tribal property.

The transfer of tribal rights of a pastoral people lends itself easily to the creation of reserves within which the chief continues to rule his tribe by native law, but beyond which he may not lead them. His personal property and personal rights are in that case secured to him; but the property in the soil itself belongs neither to him nor to his tribe, but lies in the protecting power, who may grant unreserved portions to settlers or occupants. In such a case the title to the land is usually secured by registration in a court provided for that purpose, presided over by the resident or administrator.

Whilst the future of the vast territories that have in recent years come under the influence of European nations cannot with any certainty be forecast, it must be borne in mind that the popu-

lation of the West Coast and of Central Africa, the Negro, Soudanese, and Bantu, and its offshoots, such as the Zulu, are a sturdy race. They do not melt away before civilization. It is improbable that, save in the regions beyond the tropics, or on plateaux 4,000 feet above sea level, the white inhabitants can thrive and increase, and the proportion of white to black inhabitants must always be unequal, the black preponderating by an enormous majority.

The administration of these regions under these circumstances must take different forms. The mould into which it is cast is modelled upon that of the home governments. The imperial autocracy of Germany impresses itself upon its colonial possessions and protectorates, and the bureaucratic system of France follows close upon the conquests she has won in Western Africa. The commercial origin of the Congo Free State shows itself in its exploitation of its territories upon strict business principles.

Portugal stands apart from other European nations in regard to her African possessions. Her system of government may be said to remain the same as it was two hundred years ago. The country is divided into districts presided over by Governors, who are subject to the authority of the Governor-General of Mozambique. The military, civil, and judicial functions are centred in these persons. The revenue is raised by the Prazzo system. A district called a prazzo is constituted for revenue purposes, and each one is put up to auction. The lessee who secures the privilege of the collection is entitled to levy a tax per head, which is paid either in labour, or kind, or money, so that opportunities are afforded of extracting from the natives more than their fair share of taxation. But the colonies in return are granted the privilege of returning members to the Cortes in Lisbon. Every head of a family, whether black or white, possesses the franchise, and is qualified to vote for a member for the Mozambique or Zambesi districts. The natives have been converted into citizens, but practically the control of affairs rests entirely in the Portuguese officials.

Great Britain, perhaps from greater experience of dealing with subject races, is endeavouring to adapt her administrative systems to the races with whom she has to deal. The guiding principle upon which she has been building is that of control by and through the native rulers. Tentatively she has assumed direct jurisdiction, but the idea of Protectorate in its classical meaning informs her action.

The first step towards the progressive organization of the protectorates has been to suppress the slave raids, and to give some sense of security to the people. The next was to settle the tribes

upon the soil and foster their rude industries, and to encourage trade amongst the natives. In some cases it has been necessary to re-people the country by moving whole tribes from one region to another. Tribal wars in the past have caused a movement of the people only to be paralleled by the invasion of the Goths into Europe. Warrior tribes speaking the Zulu tongue are found far north of the Zambesi, forced from the land of their birth by the pressure of more powerful nations on their flanks. These acquire but slowly the arts of peace. The policy of causing wars to cease, and forbidding the buying and selling of slaves, has paved the way, however, to a settlement of the people. Order is being restored. Confidence is felt in the officials of the protectorate; their decisions are accepted without question. The gradual growth and development of village industries, and the tilling of the soil in a more scientific way, has created a demand for commodities which must be supplied from other regions, and traffic and markets are in consequence established for their exchange and purchase. The free passage of traders of all nations to these marts and dépôts was guaranteed by the Brussels Conference, and has to a great extent been rendered possible throughout the protectorates.

Settlers within the protectorates stand upon a different footing to travellers and hunters. As the Crown by the African Orders in Council of 1892-99 has within the limits of their operation claimed jurisdiction over all natives and foreigners, she must provide for their safety and give them free access to the Courts which she has established. A civilized power must in this case assume responsibility. A plea that it was impossible to guarantee security for life and property would not avail. It would amount to an abandonment of territorial jurisdiction, and would give good cause for international intervention. Compensation for damages and losses could be successfully claimed for its subjects by the aggrieved State.

The gradual rounding off of the African possessions that has taken place within the last few years has left but the spheres of influence for development and exact delimitation. The term does not appear in the General Act of Berlin, nor did the Powers in 1885 deal with other matters than those which arose from acts of possession and proclamations of protectorate on the coasts of Africa. It may be laid down that the term sphere of influence cannot claim, apart from treaty, to bear any international significance. It expresses the intentions of two or more contracting parties mutually to abstain from interference with one another within certain definite limits. None others, save those who have

entered into the engagements, are bound by the self-denying ordinances. But on notification of the signing of such treaties other Powers would, by the comity of nations, express their assent or reserve their liberty of action.

The spaces or spheres are, as a matter of fact, those regions adjacent to colonies or protectorates already subject to some form of administration or control, which seem geographically as well as politically to be the natural outlets for the enterprise of pioneers. Mountain ranges, the watersheds of rivers, lakes, and deserts, mark out certain portions of the earth's surface from the rest.

The wave of influence must start from some centre, and receive its impulse from some base. The sphere over which it is flowing cannot be, as it were, in the air, it must have some connexion by land or water with a more established form of government. It becomes a branch or offshoot of the parent stem which will in time be vivified with the same sap and from the same soil.

The arrangements made by the various Powers as to their several spheres of influence have been in most cases formed upon certain existing facts. The districts as apportioned for future operations have already been brought into touch with existing organizations. The missionaries of all religious denominations and nationalities have found a fruitful field for their labours in the almost inaccessible places of Africa. They have made their way from village to village through pathless forests, and under difficulties almost insurmountable, into regions absolutely unexplored and unknown. There they have settled down and endeavoured to instruct the natives in their several faiths, and at the same time to teach them useful industries. By their care of the sick, and a simple use of medicine and surgery, they have gathered round their settlements a fixed population who have learnt from them the first rudiments of civilization. By these means the influence of the white man has been vastly extended. In some cases the chiefs of powerful tribes have been converted to the faith of the missionaries, and have favoured the establishment of these amongst their people, and their neighbours, hearing of the benefits which have been received, have asked that they too should have like advantages. Thus from village to village these little settlements have spread.

In some cases these missionary communities, when formed within a protectorate, have been granted by the commissioner by-laws or town laws for their self-government. Elders are elected by the township, who sit in what is called *Baraza*, to inquire into and deal with minor offences, referring those of a serious nature to the missionary, who communicates them to the district officer. The

penalties inflicted are fines, which are used for local purposes, such as the maintenance of roads and public buildings. The public health and safety, the attendance of children at the mission school, and the prohibition of the sale of native beer (tembe kali) and bhang are amongst the matters dealt with by these regulations.

East African Ordinances, p. 16.

Though in the majority of instances the missionaries have confined themselves to the propaganda of their doctrines, and abstained from intermingling in the politics of the tribes, yet the acceptance of the God and the religion of their teachers passes by an easy stage into a recognition of their earthly king. The missionary cannot throw off his allegiance to his own sovereign wherever he may be, and consciously or unconsciously the country from which he comes must be foremost in his thoughts, and it is unlikely that he should prefer another government to his own. This powerful influence, therefore, is given to his fellow countrymen for obtaining from the king to whom he is spiritual adviser a treaty of protection or a promise of non-cession of his territory to another Power.

The societies in Europe engaged in missionary and philanthropic work in Africa are in many cases wealthy, and have great influence in their own countries, and they are thus able to exert pressure upon their governments at home, and to demand help and assistance when their agents abroad may need it. The necessary supplies of men and material are sent out to the distant missions, and in that way their influence is augmented. The native communities have in some cases themselves dispatched agents to evangelize those tribes which are ignorant of the Christian religion. It is by efforts such as these within the spheres of influence that the way is paved for a more organized system of government. The next step is the proclamation of a protectorate, the appointment of a resident, and the opening of free and safe routes of communication.

The white man's burden has been taken up by European nations for diverse reasons. A land hunger and a desire to provide fresh territories for an overflowing population has in one case been the determining motive, in another a forward march from conquest to conquest, in yet another the burden has been handed down from generation to generation, and would, without regret, be passed to other shoulders; the possession of ports and outlets for trade which should be the monopoly of the occupier, or the opening out of fresh markets for goods and manufactures, has called others to the task. But amidst all the mass of conflicting motives there may be discerned a vein of humanity and a manifest desire to impart to the African native the benefits of civilization. All the

Powers concerned with the Brussels Conference have carried out, as far as possible, the humane principles laid down for their guidance. Whether their efforts will succeed in raising the African in the scale of civilization is a question which the future alone can decide, but it will not be disputed that for many generations the centre of gravity in regard to all international relations as to the future development of the Dark Continent must be sought for in Europe and not in Africa.

S. McCALMONT HILL.

ELECTION BETWEEN ALTERNATIVE REMEDIES.

THE doubt raised by the case of *Rice v. Reed* [1900] 1 Q. B. 54 in Mr. Griffiths' mind¹ is 'whether the *successful* application for the interim injunction in the action against Soltau and the Bank did not operate as a conclusive election to waive the tort and sue for money had and received'; and it would appear that, had the application referred to been unsuccessful, he would not have contended that there would have been an election, as he himself quotes *Morris v. Robinson* (3 B. & C. 196, 27 R.R. 322) as an authority for the proposition that where a plaintiff 'having alternative remedies for conversion and for money had and received applied to a Court for payment of the money, but his application was ineffective, it was held that he had not elected.' In other words, the suggestion is that election depends, in a case like *Rice v. Reed*, not on the intention of the plaintiff who elects, but on the decision of the Court to which he applies, which decision presumably cannot affect the intention existing in the plaintiff's mind when he makes his application.

Before the decision is condemned on this ground the following observations are submitted in its support:—

Firstly. It is by no means clear that precisely the same principles apply where the injured party has one tortfeasor to deal with as where he has two, and it is submitted as worthy of consideration (the point seems never to have been decided) whether any step against one of two tortfeasors which does not discharge the cause of action (i. e. by judgment, release, or accord and satisfaction) will prevent the injured party from pursuing whichever branch of the joint cause of action he chooses against the other tortfeasor.

It is clear that precisely the same principles do not apply in the two cases, e. g. where there is one tortfeasor a covenant by an injured party not to sue him will operate as a release of the cause of action (*Ford v. Beech*, 11 Q. B. 852, at p. 871); whereas where there are two tortfeasors a covenant not to sue one of them will not debar the injured party from suing the other tortfeasor (*Duck v. Mayeu* [1892] 2 Q. B. 511). On the other hand, a release of one tortfeasor will discharge all, as the cause of action is thereby discharged (*Cocke v. Jennor*, Hob. 66).

¹ LAW QUARTERLY REVIEW, vol. xvi, p. 160.

Moreover the general principles, which Mr. Griffiths deduces from the authorities which he examines, are inapplicable where there are two tortfeasors. .

The vague language quoted from one of the judgments in *Smith v. Baker* (L. R. 8 C. P. 350), which is merely dictum, as the cause of action had there been discharged by what was held equivalent to a judgment in the action for money had and received, is inapplicable to a case where *A* having obtained a sum from one tortfeasor, which goes in reduction of the damages he can recover from the other, seeks to obtain from the other, not a further advantage, but the amount of damages he has sustained, less the amount he has already recovered from the first tortfeasor. As to the passage cited from *Scarff v. Jardine* (7 App. Cas. 345) (which is not a case of election between alternative remedies in tort or contract, but between the right to sue one of two sets of parties in contract) the principle there enunciated does not apply to such a case as *Rice v. Reed*. The election there in question is stated to depend on the unequivocal act having been done *to the knowledge of the persons concerned*, reasoning quite inapplicable to a case like the present one, where one tortfeasor is not concerned with, save in so far as he may derive benefit from, any negotiations carried on with his co-tortfeasor. In fact the one tortfeasor may not hear of any settlement which may be made with his co-tortfeasor, as was the case in *Rice v. Reed*, until it is disclosed, months afterwards, by the answers to interrogatories in the action against him.

In the passage cited from *Clough v. L. & N. W. R. Co.* (L. R. 7 Ex. 26) it is assumed that the cause of action had been discharged by judgment in an action in one branch of the alternative claim, and no question of election could thereafter arise.

Thus so far as concerns general principles, they are inapplicable to the case in point.

So far as the specific cases are concerned, there are, no doubt, dicta in support of the proposition that something short of a judgment, release, or accord and satisfaction, in one of the two alternative causes of action may amount to an election, where there is one tortfeasor, but it is submitted that the cases of *Brewer v. Sparrow* (7 B. & C. 310), *Lythgoe v. Vernon* (5 H. & N. 180), and *Armstrong v. Allan* (67 L. T. 738), which are the only authorities cited for the proposition, are by no means satisfactory.

In *Brewer v. Sparrow* (7 B. & C. 310) the decision seems largely to have turned on the fact that the cause of action had been discharged by accord and satisfaction. (See the judgment of Holroyd J. at p. 313.) This fact is mentioned by Martin B. in *Lythgoe v. Vernon* (5 H. & N. at p. 182): 'Holroyd J. seems rather to consider that the

plaintiffs received the amount of the balance as a satisfaction for the wrongful act done by the defendant.'

In *Lythgoe v. Vernon* (5 H. & N. 180) no reasons are given for the judgment; but it may well have been based on the ground that the cause of action for money had and received had been discharged by accord and satisfaction. The balance had been paid into Court and was by the pleadings accepted in satisfaction of the claim for money had and received.

Armstrong v. Allan (67 L. T. 738), it is submitted, is not really an authority in point. Messrs. Armstrong had there a right to sue the defendants and Nicholl & Co. for conversion, or Nicholl & Co. for the price of goods sold and delivered, and they brought an action for conversion against the defendants, in which they joined Nicholl & Co. as co-plaintiffs, and subsequently completed the contract for sale with Nicholl & Co., and accepted from them the price of the goods. It was held that, having completed the sale to Nicholl & Co., Messrs. Armstrong could not proceed with the action for conversion, in which they had joined Nicholl & Co. as co-plaintiffs, the only ground for the action being that Nicholl & Co. had no title to the goods. It is difficult to see what bearing this has on a case where, so far from the injured party joining one of the tortfeasors as a co-plaintiff, which he could only do on the footing that he had not committed a tort, he sues him as a tortfeasor.

But, in any case, there was in *Armstrong v. Allan* no question of election between two alternative remedies arising out of the same cause of action, but a question whether a plaintiff having two independent remedies, not arising out of the same cause of action, e. g. a right to sue the purchaser for goods sold and delivered and another person for trover, could pursue both, and it was held that under the circumstances he could not.

The distinction was pointed out during the argument in *Buckland v. Johnson* (15 C. B. 145, at p. 153), 'Cresswell J. A recovery in trover would be no answer to an action for goods sold and delivered,' though it would be an answer to an action for money had and received.

The only cases where, so far as is known, the question how far proceedings against one tortfeasor affect the remedy against the other tortfeasor, is discussed at any length are *Hitchin v. Campbell* (2 Wm. Blackstone's Reports, 827) and *Buckland v. Johnson* (15 C. B. 145).

In *Hitchin v. Campbell*, *A*, having his election to sue *B* for money had and received, or *B* and *C* for trover, sued *B* and *C* for trover and judgment was found for *B* and *C*. He then sued *B* for money had and received, and it was held that judgment ought to be entered

for *B*, because *A*, having sued in trover up to judgment, was not entitled to bring the same cause of action to trial again.

De Grey C.J., in delivering the judgment of the Court (2 W. Bl. at p. 830), considers:—

‘(1) Whether a man having once elected to proceed upon the tort, bars him from proceeding upon the contract; (2) whether his proceeding down to judgment does not bar him from trying the same cause of action again. . . .’

‘(1) As to the first, . . . where both remedies are merely real or merely personal, there the election is not determined till the judgment on the merits. . . .’

‘(2) But in the present case, the action of trover went on to a verdict and judgment; and appears, by the case stated, to have been for the same cause of action. And upon this it is that the opinion of the Court is founded. The rule of law is, *Nemo debet bis vexari pro eadem causa*. And, in *Ferrers’ case*, 6 Co. Rep. 7 a, 7 Cro. Elizabeth, 667, it is held that where one is barred in any action, real or personal, by Judgment or Demurrer, Confession, Verdict, &c., he is barred as to that or the like actions, of the like nature for the same thing, for ever.’

In *Buckland v. Johnson* (15 C. B. 145) which was a case where *A*, having a cause of action in trover against *B* and *C*, and for money had and received against *C*, had sued *B* to judgment for trover (which judgment had remained unsatisfied), it was held that *A* was disentitled to sue *C* for money had and received, and it would seem that the basis of the judgments was that the joint cause of action had been merged in the judgment against *B*. In the language of Maule J. (at p. 166), the plaintiff, ‘having his election to sue in trover for the value of the goods or for the proceeds of the sale as money had and received, the plaintiff elected the former remedy and he has obtained a verdict and judgment. . . . There is an end of the transaction. Having once recovered a judgment, his remedy was altogether gone: his claim was satisfied as against all the world.’ It will be noticed that in neither *Hitchin v. Campbell* nor in this case is the election placed on the ground of the mere issue of the writ for conversion, which would have been a short way of deciding the cases, could they have been decided on such a ground, but upon the fact that the cause of action had been discharged. ‘The judgment of a Court of record changes the nature of that cause of action and prevents its being the subject of another suit, and the cause of action being single cannot afterwards be divided into two’ (Jervis C. J., 15 C. B. at p. 164).

It is accordingly submitted that neither in principle nor authority can any arrangements made by the injured party with one tortfeasor, which does not discharge the joint cause of action, destroy the cause of action as against the other tortfeasor.

Secondly. But assuming that, where two tortfeasors are concerned, the injured party can so elect, in proceeding against one, as to debar himself from proceeding against the other, even though the joint cause of action is not discharged, the question of election is, in such a case, not a question of law, but one of fact, to be determined by a consideration of all the circumstances.

This is clearly laid down in *Smith v. Baker* (L.R. 8 C.P. 350), where Bovill C.J., at p. 355, after stating that in his view the commencement of an action, either for money had and received or for trover, is in point of law a conclusive election, says:—

‘There is another class of cases in which an act is of an ambiguous character and may or may not be done *with the intention* of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law.’

Again at p. 353:—

‘Would receipt of the proceeds of a wrongful sale always waive the tort? Is it not rather a question of fact to be considered with relation to the circumstances of each case, *whether there has been what amounts to an election to affirm the wrongful act?*’

The test, accordingly, is not as suggested, ‘whether the injunction . . . is a proceeding equally consistent with either of the alternative remedies,’ but whether, upon consideration of all the facts of the case, there was an intention of adopting and affirming the wrongful sale; and the intention being the test, the success or failure of the application is immaterial. It may be that if the person who has the right to elect adopts an unambiguous course, which can admit of no possible explanation but that he thereby irrevocably elected to pursue one only of his two remedies, e.g. issued a writ for money had and received, or conversion, he cannot, as a matter of law, be afterwards heard to say that he had no intention of electing. However, having regard to the dicta in *Priestley v. Fernie* (3 H. & C. 977) and *Hitchin v. Campbell* (2 Wm. Blackstone 827), it is by no means clear that the mere issue of a writ would be held to be an irrevocable election. But so far as is known, there is no authority for the proposition that in any case, where the cause of action is undischarged, except perhaps where a writ has been issued for money had and received, or conversion, election is anything but a question of fact.

Once it is understood that the question in a case like *Rice v. Reed* is one of fact and not of law, the solution is easy, as it is not, and could not be, suggested that in this case there was any intention to affirm the wrongful sale. The obvious intention in applying for the

injunction was to make whichever branch of the alternative claim was proceeded with fruitful.

In other words, the fallacy which, it is suggested, lies at the root of the argument urged against *Rice v. Reed* is that it, without justification, treats election as being always a question of law, whereas in a case where the cause of action is undischarged, or the act not entirely unambiguous, it is really one of fact.

Thirdly. There is another and simpler ground upon which the decision in *Rice v. Reed* can be justified. It is that where *C* bribes *A*'s servant, *B*, to sell to him (*C*), *A*'s goods at an undervalue (which is what happened in this case), *A* can recover the amount of the bribe from *B* in an action for money had and received, and then recover from *C*, in an independent action, the whole amount of the damage he has sustained, by reason of his having entered into the contract, without deducting from such amount the money recovered from *B*. (See *Salford v. Lever* [1891] 1 Q. B. 168.)

J. F. W. GALBRAITH.

THE RULE IN *HADLEY v. BAXENDALE*.

IT sometimes happens under exceptional circumstances that the breach of a contract occasions to the party damnified losses connected with the breach in a mode which the most imaginative person could not have anticipated unless his attention had been directed to the peculiarity of circumstance. Against liability for such damage the party in fault is protected by familiar rules. It is proposed in this article to consider how far this immunity extends and in particular how far it may be modified by a disclosure of the exceptional conditions connecting the damages with the breach. How far, in other words, can *A* by informing *B* of special circumstances connected with a contract between them recover from *B*, if the latter break it, compensation for damages, the probable occurrence of which without such disclosure *B* could not have foreseen but with it should not have overlooked?

It is of course assumed that given a knowledge of the special circumstances the damages are connected with the breach proximately enough to create liability consistently with the ordinary standard. As Cockburn C.J. expressed it: 'You must have something immediately flowing out of the breach of contract complained of, something immediately connected with it and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of¹.'

The leading case in point is *Hadley v. Baxendale*², and it will be convenient to set out in full certain portions of the judgment which Alderson B. delivered on behalf of the Court:—

'We think,' it runs, 'the proper rule in such a case as the present is this: When two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i. e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now if the special circumstances under which the contract was naturally made were communicated by the plaintiff to the defendant and thus known to both parties

¹ *Hobbs v. L. & S. W. R. Co.*, L. R. 10 Q. B. 111.

² 9 Ex. 341.

the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract, under those special circumstances so known and communicated. But on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For had the special circumstances been known the parties might have specially provided for the breach of contract by special terms as to the damages in that case: and of this advantage it would be very unjust to deprive them.'

Of the rule thus laid down Lord Esher M.R. in *Hammond v. Bussey*¹ said:—

'It may be that the rule was not necessary for the purpose of deciding that case, but it is far too late to question it. The rule, though frequently commented upon, has been over and over again adopted by the Court and must now be considered to be the law on the subject.'

It becomes, therefore, necessary to examine the scope and effect of the rules laid down by Alderson B. He was believed to have stated three rules for estimating the damages springing from breach of contract. The learned author of *Mayne on Damages*² summarizes these supposed rules as follows:—

'1. Damages which may fairly and reasonably be considered as naturally arising from a breach of contract . . . are always recoverable.

'2. Damages which would not arise in the usual course of things from a breach of contract but which do arise from circumstances peculiar to the special case are not recoverable unless the special circumstances are known to the person who has broken the contract.

'3. Where the special circumstances are known to have been communicated to the person who breaks the contract, and where the damage complained of flows naturally from the breach of contract under those special circumstances, then such special damage must be supposed to have been contemplated by the parties to the contract, and is recoverable.'

A simpler statement of the effect of the judgment might perhaps be made in the following way:—

When two parties make a contract and one of them breaks it, he is liable to pay to the other such damages as may be considered either

(a) to arise naturally, i. e. according to the usual course of things from such breach of contract itself, or

¹ 20 Q. B. D. at p. 87.

² 6th ed. p. 12.

(b) to have been in the contemplation of the parties at the time they made the contract as the probable result of its breach.

The division of damages headed (b) clearly adds something to that headed (a), for circumstances may entitle or oblige the parties to apprehend consequences unnatural without special knowledge, natural with it. To illustrate this possibility the judgment proceeds:—

‘If the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so communicated.’

It is, however, by no means equally clear that the division headed (a) adds anything to that headed (b). If Alderson B. is right in adopting the knowledge of the parties as the criterion, a still further simplification becomes possible. It is no longer necessary to distinguish between damages which flow naturally from the breach and those which the parties contemplate or ought to contemplate as its probable result; the attempt to do so is inept, for persons do or ought to contemplate as the probable result of a breach the damages which naturally flow from it. The practical identity of the rules was recognized by Selden J. in a leading American decision, *Griffin v. Colver*¹. The learned judge observed:—

‘The damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract, that is, must be such as might naturally be expected to follow its violation.’

So in *Smith v. Green*², Grove J. took exception to the expression ‘natural’ consequences and observed:—

‘Normal or likely or probable of occurrence in the ordinary course of things would perhaps be the more correct expression.’

That persons may be ‘reasonably supposed to have contemplated’ damages which are ‘normal or likely or probable of occurrence’ is a proposition which need not be supported at length. *Hadley v. Baxendale* then lays down one positive rule, and one only. The damages for breach of contract are such damages as a reasonable man sharing the knowledge of both contracting parties would have apprehended at the time the contract was made as likely to spring proximately from its breach. Mr. Mayne hardly appears to do justice to the explicitness of the dictum; thus he speaks of the ‘supposed’ rules and their ‘supposed’ effect. The truth is that *Hadley v. Baxendale*, the general authority of which has been equally

¹ 16 N. Y. 489.

² 1 C. P. D. 92.

recognized in this country and in the United States, clearly though *obiter* bases the liability to pay damages for breach of contract on the knowledge, actual or constructive, which the party making default had of the probable consequences of his breach. The principle is unreservedly laid down, and 'it is far too late to question it.'

A man who breaks his contract with his eyes open is liable for the damages which a prudent man with the same information would have foreseen as likely to follow. Thus *A* breaks his contract with *B*: normally the damages proximately occasioned would not exceed £100, but in this particular case, owing to special circumstances which have been communicated to *A*, they will amount to £1,000. *Hadley v. Baxendale* lays it down that *B* can recover £1,000 from *A*. When the circumstances are normal, as in the first case, a prudent man will contemplate and be liable for damages to the amount of £100; when they are peculiar, and he is affected with knowledge of their peculiarity, he will contemplate and be liable for damages to the greater amount. It is interesting to notice that the Code Napoléon lays down rules as the measure of damages which were cited in *Hadley v. Baxendale* by Parke B.¹ and which may have suggested some phrases in the judgment. The material sections in the code are as follow²:—

'Les dommages et intérêts dus aux créanciers sont, en général, de la perte qu'il a faite et du gain dont il a été privé, sauf les exceptions et modifications ci-après.

'Le débiteur n'est tenu que des dommages et intérêts qui ont été prévus ou qu'on a pu prévoir lors du contrat, lorsque ce n'est point par son dol que l'obligation n'est point exécutée.

'Dans les cas même où l'inexécution de la convention résulte du dol du débiteur, les dommages et intérêts ne doivent comprendre à l'égard de la perte éprouvée par le créancier et du gain dont il a été privé, que ce qui est une suite immédiate et directe de l'inexécution de la convention'³.

The clause dealing with the 'dommages . . . qui ont été prévus ou qu'on a pu prévoir lors du contrat,' and the reservation as to proximity, state exactly the principles on which the English law is believed to proceed.

It is proposed shortly to consider one or two leading English decisions in which the points here discussed have arisen. Attempts have sometimes been made in argument to exhibit what may be called the 'doctrine of notice' in an extreme and ridiculous form: to meet them it is usually sufficient to repeat that here, as elsewhere, *non remota causa spectatur*.

¹ 9 Ex. at p. 346.

² Cited Sedgwick on Damages, ed. 7, p. 94.

³ Code Civil, Bk. III, Tit. III, sec. 1149, 1150, 1151.

In the *British Columbia Saw-mills Co. v. Nettleship*¹, Willes J. refers to 'the old case said to have been decided about two centuries and a half ago, where a man going to be married to an heiress, his horse having cast a shoe in the journey, employed a blacksmith to replace it, who did the work so unskilfully that the horse was lamed and the rider not arriving in time the lady married another and the blacksmith was held liable for the loss of the marriage.' It is hardly necessary to observe that the man of the anvil, even with notice of his customer's errand, could hardly have apprehended in the bride an *animus nubendi* so imperious and undiscriminating. 'To guard,' however, 'against a similar absurdity,' the learned judge laid down some general principles to which we may recur after a short consideration of this important case. The facts appear sufficiently from the head note:—

'The plaintiffs delivered to the defendants' servants on a quay at Glasgow for shipment on board the defendants' vessel which lay alongside, several cases containing machinery which was intended for the erection of a saw-mill at Vancouver Island. The defendants knew generally of what the shipment consisted. On the arrival of the ship at her destination one of the cases which contained the machinery, without which the mill could not be erected, could not be found on board, and the plaintiffs were obliged to send to England to replace the lost articles: Held that the measure of damages for the breach of contract was the cost of replacing the lost articles in Vancouver Island with interest.'

In fact, the loss of one piece of machinery made the others useless, and the plaintiffs sought to recover all the profits they lost while the mill was thus compulsorily idle. The adverse decision can perfectly well be defended on the ground that the defendant had no reason for supposing that the loss of one case would have the effect of keeping the whole mill idle, but the dicta of Willes J. carried the matter further.

'Though the shipowners knew from the shippers the use they intended to make of the articles, it could not be contended that the mere fact of knowledge without more would be a reason for imposing upon him a greater degree of liability than would otherwise have been cast upon him. To my mind that leads to the inevitable conclusion that the mere fact of knowledge cannot increase the liability. The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special condition attached to it. . . . Knowledge on the part of the carrier is only important if it forms part of the contract. . . . Knowledge in effect can only be evidence of fraud or

¹ L. R. 3 C. P. p. 508.

of an understanding by both parties that the contract is based upon the circumstances which are communicated¹.

These observations must of course carry the greatest possible weight, but perhaps they are not altogether irreconcilable with the rule attributed to *Hadley v. Baxendale*. The effect of 'knowledge' is repeatedly discussed. Knowledge of what? 'Of the use the shippers intended to make of the articles.' Such knowledge, it is unanswerably pointed out, may not add to the shipowners' liability, but if there is added an appreciation of the damages which will proximately follow on a failure to deliver, an appreciation which may depend on the knowledge of an indefinite number of additional facts, he may well be liable. So Pothier, Part I. c. 2, s. 162.

'Sometimes the debtor is liable for the damages and interests of the creditor although extrinsic, which is the case when it appears that they were contemplated in the contract and that the debtor submitted to them either expressly or tacitly in case of the non-performance of his obligation.'

Mr. Mayne² discusses the point thus raised as follows:—

'The question comes to this. The law says that everyone who breaks a contract shall pay for its natural consequences and in most cases states what those consequences are. Can the other party, by merely acquainting him with a number of further consequences which the law would not have implied, enlarge his responsibility to the full extent of all those consequences without any contract to that effect? No doubt it may be said that it was in the power of the defendant to have expressly refused such responsibility. True. But ought not the onus of making a contract rather to lie on the party who seeks to extend the liability of another than upon him who merely seeks to restrain his own within its original limits? This reasoning would seem to apply with special force to cases such as that of a common carrier, where the defendant would certainly be unable to decline the duty which was thrust upon him, and might even be unable to exact any additional remuneration for performing it.'

This argument seems to ignore completely the rationale of the rule that 'everyone who breaks a contract shall pay for its natural consequences.' It assumes also, and surely most erroneously, a constant uniformity in the naturalness of consequence. There is no such uniformity in fact. Of the same act one consequence may be natural in one set of circumstances, another in another. A manufacturer, for instance, fails to deliver an anchor to a ship, which to his knowledge is about to proceed into dry dock where it will be detained for a long time. Here the damage 'naturally' following may be assumed to be inconsiderable. Suppose however

¹ pp. 508-9.

² Mayne on Damages, 6th ed. pp. 30-1.

that the ship, to the knowledge of the manufacturer, is sailing under a penalty clause on the day when the anchor should be delivered, here the 'natural' damage for which the manufacturer is clearly liable¹ will be the losses following proximately from the detention, including it must be supposed the amount of the penalty. To one cognisant of the facts it is a natural consequence of the failure to deliver an anchor to a vessel which is in all other respects ready for the voyage, and cannot sail without it, that she should be detained. Once admit the test—what consequences would the parties, if they had addressed their minds to the possibility of a breach, have contemplated as likely to attend it?—and the consideration of knowledge becomes paramount. As Blackburn J. said in *Cory v. Thames Ironworks Co.*²:—

'The damages are what would be the natural consequences of a breach under circumstances of which both parties are aware.'

The observations of Mr. Mayne which have been set forth above were referred to with approval in the Exchequer Chamber in the case of *Horne v. Midland Railway Co.*³ when the subject of this article was much discussed. I borrow Mr. Mayne's summary of the facts in that case. 'The plaintiffs were under a contract to deliver in London on February 3, 1871, shoes for the use of the French Army during the late war. The price was an unusually high one. They handed them over to the defendants for carriage, stating that they were under a contract to deliver by the 3rd but not stating the special nature of the contract. The shoes were delayed, in consequence of which the purchasers refused to take delivery, and the contract was lost. The plaintiffs had to sell them at the ordinary market price. The price had not varied between the day at which they were due and the day at which they were received, but it was below the special contract price of which the defendants were ignorant. It was held that the defendants were not liable for the difference between the ordinary market value of the shoes and the particular contract price, they not having been informed of the special circumstances which led to the special loss.' The decision was inevitable; a man cannot contemplate damages if they spring from exceptional circumstances which are not brought to his notice, and of the special contract price the defendant knew not a word. In the Court below Willes J.⁴ observed:—

'The contract was an exceptional one at the time the shoes were delivered to the carriers, and they ought to have been informed

¹ *Wilson v. General Iron Co.*, 47 L. J. Q. B. 239.

³ L. R. 7 C. P. 583; L. R. 8 C. P. 131.

² L. R. 3 Q. B. at p. 186.

⁴ P. 570-1.

of the fact that by reason of special circumstances the sellers would, if the delivery had taken place in time, have been entitled to receive from the consignee a larger price for the shoes than they would have been entitled to in the ordinary course of trade. It must be remembered that we are dealing with the case of a common carrier who is bound to accept the goods. It would be hard indeed if the law were to fix him with the further liability which is here sought to be imposed upon him because he has received a notice which does not disclose the special and exceptional consequences which will, or may, result from a delayed delivery. I go further: the knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with reasonably believes that he accepts the contract with the special conditions attached to it.'

The doubt here suggested by Willes J. as to whether notice could have any effect unless it forms part of the contract was repeated by Blackburn J. in the Court of Exchequer Chamber¹. The saying is perhaps a hard one, for as a learned judge has observed, parties contemplate the performance and not the breach of their obligations, so that an explicit term in the contract is hardly to be looked for. The point is considered below in connexion with the judgment of Blackburn J.

In the Court of Exchequer Chamber, *Horne v. Midland Railway Co.* was discussed at great length and the effect of notice carefully examined². Kelly C.B. called attention, as Willes J. had done before him, to a difficulty which is created by 'the doctrine of notice,' where the party committing the breach is a common carrier.

'A question of very great importance has been raised in the course of the argument; the question, what is the position of a railway company when goods are entrusted to it for carriage with an intimation of the consequences of non-delivery? Now it is clear, in the first place, that a railway company is bound in general to accept goods such as these, and to carry them, as directed, to the place of delivery and there deliver them. But suppose that an intimation is made to the railway company stating in express terms that the consignees have entered into such and such a contract and will lose so many pounds if they cannot fulfil it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impress upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any such power, such as was

¹ L. R. 8 C. P. p. 141.

² E. & E. at p. 608.

suggested, to decline to receive the goods after such a notice, unless an extraordinary rate of carriage be paid¹.

The argument, which is an attractive one, may be summarized as follows. In some cases the formation of a contract with notice that its breach will be followed by exceptional damages may be evidence of readiness to abide such damages, but no such inference can be drawn to the prejudice of a common carrier who has no discretion to decline the contract. Lush J.² differed from Kelly C.B. in a material point.

‘(The carrier) is not at liberty to refuse to carry on the ordinary terms, but if it is sought to impose upon him a liability of an extraordinary nature arising out of peculiar circumstances, then I think he is entitled to decline to carry, unless he be paid a higher rate of carriage.’ The learned judge supported his view by a reference to *Riley v. Horne*³ where, however, the language used was of a somewhat general character. Pigott B. took a similar view. ‘(The carriers) may decline to carry goods which are not tendered to them for carriage upon the ordinary liability of common carriers, unless the consignees will enter into a special contract in relation to such goods⁴.’ Whether the view be sound or not—a point upon which direct authority seems to be wanting—considerations of another kind may modify the apparent hardship to railway companies. It is true that the doctrine of notice may render them liable if they break their contract to unusual though not un-contemplated damages. It may be admitted for the argument that they cannot refuse to form the contract. Such a disability is not inconsistent with the liability which it is attempted to impose upon them. By the favour of the community, such bodies in effect enjoy a highly lucrative monopoly. May not the legislature be conceived as of saying to them:—We concede such and such privileges to you; it is a condition of the concession that you shall not refuse to contract with persons desirous of doing so within the limits assigned to you; if you break such contracts your liability to pay damages shall differ in no respect from that of any other person who breaks his contract? Is it a much more violent invasion of the independence of a railway company to say:—‘Under such and such circumstances you may not refuse to contract and for breach of such contracts you shall pay the damages imposed by law upon persons who break their contracts’ than to say simply ‘You shall contract with A, whether you wish it or not’? Yet it is well known that railway companies may not refuse to receive as passengers

¹ L. R. 8 C. P. p. 136.

² 5 Bing. 212, 217; 30 R. R. 576.

³ *u. s.* at p. 145.

⁴ L. R. 8 C. P. at p. 143.

any person of decent behaviour who tenders the appropriate fare¹. On a just view, the latter occasion of compulsion is the more exacting; after all a railway company is not bound to break its contracts. Before leaving *Horne's* case, reference may be made to the judgment of Blackburn J. On the point under consideration he said:—

'In the case of *Hadley v. Baxendale* it was intimated that apart from all question of a special contract with regard to the amount of damages, if there were a special notice of the circumstances the plaintiff might recover the exceptional damages. This doctrine has been adverted to in several subsequent decisions with more or less assent, but they appear to have all been cases in which it was held that the doctrine did not apply because there was no special notice. It does not appear that there has been any case in which it has been affirmatively held that in consequence of such a notice the plaintiff could recover exceptional damages . . . I should be disposed to agree . . . that in order that the notice may have any effect it must be given under such circumstances, as that an actual contract arises on the part of the defendant to bear the exceptional loss².'

Perhaps it may not be too bold to suggest as a commentary, not a criticism, on this view that having regard to admitted rules the liability of one who contracts with notice of circumstances which enlarge the area of natural damages should in the absence of an express disclaimer become automatically co-extensive in respect of such damages. In other words, if the liability to pay damages for breach of contract in truth rests on the duty to contemplate certain results, a man who contracts with knowledge imposing upon him the duty of such contemplation does in fact agree to be liable within the limits covered by his knowledge. The law says he is liable if he contemplates the results of breach; notice of the circumstances made it his duty to contemplate such results. Can he be heard to say not 'I neither did nor was bound to contemplate the result,' but 'I did contemplate it but never agreed to be liable for it'? If the liability is a legal one at all it is a necessarily inherent element in every contract from which it is not in terms excluded, and the requirement that the notice 'must be given under such circumstances as that an actual contract arises on the part of the defendant to bear the exceptional loss' is satisfied without difficulty.

The learned judge observed in the passage cited above that he knew of no affirmative decision confirming the dictum in *Hadley v. Baxendale* as to the effect of notice. The objection is perhaps not

¹ *Pickford v. Grand Junction Ry. Co.*, 16 M. & W. 399.

² L. R. 8 C. P. at p. 141

very fatal because so far as I have been able to discover the point has not since arisen substantively. Certainly there has been no decision against the rule, though it has frequently been held on the facts of particular cases that a given notice was insufficient and therefore powerless to bind the defendant. Such dicta inferentially support the view here set forth as to the effect of notice. In *Portman v. Middleton*¹, *Smeed v. Ford*², *Gee v. L. & Y. R. Co.*³, and *Horne v. M. Ry. Co.*⁴ itself, the Court attempted to discover what damages might reasonably be supposed to have been within the contemplation of the parties, and in all these cases the failure to give notice of special circumstances was treated as fatal to the cause of action. If in any case the notice would have been inoperative, the *ratio decidendi* was very misleadingly stated.

In *Simpson v. L. & N. W. R. Co.*⁵ the decision itself may be upheld on other grounds, but the language used by Cockburn C.J.⁶ was perfectly general.

'The law as it is to be found in the reported cases has fluctuated, but the principle is settled that whenever either the object of the sender is specially brought to the notice of the carrier, or circumstances are known to the carrier from which the object ought in reason to be inferred, so that the object may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure of that object.'

The cases of *Elbinger Actien-Gesellschaft v. Armstrong*⁷, and *Grébert-Borgnis v. Nugent*⁸, are further referred to by Mr. Mayne, but I do not think it necessary to consider these cases in detail. They appear merely to illustrate the rule, itself only an application of the general principle, that where *A* breaks his contract with *B*, thereby putting it out of *B*'s power to carry out a sub-contract with *C*, of which *A* was informed, the results which *A* must be taken to have contemplated include (1) a loss of profit by *B*, (2) a liability of *B* to pay damages to *C*.

A reference may finally be made to the code of the State of Louisiana, articles 2294, 2295⁹ :—

'When the object of the contract is anything but the payment of money, and when the debtor has been guilty of no fraud or bad faith, he is liable only for such damages as were contemplated by, or may be reasonably supposed to have entered into the contemplation of, the parties at the time of the contract.'

The saving as to money contained in the above passage makes it convenient to point out that when the breach of contract is the

¹ 4 C. B. N. S. 322.

² L. R. 8 C. P. 131.

³ L. R. 9 Q. B. 473.

⁴ 1 E. & E. 602.

⁵ 1 Q. B. D. 274.

⁶ 15 Q. B. D. 85.

⁷ 6 H. & N. 211; 30 L. J. Ex. 11.

⁸ 1 Q. B. D. at p. 277.

⁹ Cited Sedgwick, ed. 7, p. 103.

non-payment of a sum of money or the dishonour of a note, the general principle of damages yields to the singular rule that damages are not to exceed legal interest from the day that payment becomes due. A similar rule is applied in the United States¹ and in France². On grounds of convenience a completely arbitrary standard is substituted for the principle of compensation. Thus if *A* breaks his contract to pay *B* £100, and the rate of interest is 5 per cent. per annum, the law gives *B* £105 for a year's delay, without inquiring whether his losses proximately occasioned have been £1 or £100. The practice must be distinguished as exceptional.

Mr. Mayne³ sums up his view as follows:—

‘In the present state of the authorities, therefore, I would suggest that in place of the third rule supposed to be laid down by *Hadley v. Baxendale*, the law may perhaps be as follows:—

“First. When there are special circumstances connected with a contract which may cause special damage to follow if it is broken, mere notice of such special circumstances given to one party will not render him liable for the special damage unless it can be inferred from the whole transaction that he consented to become liable for such special damage.

“Secondly. When a person who has knowledge or notice of such special circumstances might refuse to enter into the contract at all or might demand a higher remuneration for entering into it, the fact that he accepted the contract without requiring any higher rate will be evidence, though not conclusive evidence, from which it may be inferred that he has accepted the additional risk in case of breach.

“Thirdly. When the defendant has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration, the fact that he proceeded in the contract after notice or knowledge of such special circumstances, is not a fact from which an undertaking to incur a liability for special damages can be inferred.”’

With great respect for the high authority of Mr. Mayne's work, I believe the following propositions to represent the law more accurately.

(1) The measure of damages for breach of contract is determined by the knowledge, actual or constructive, which the parties had of the probable consequences of the breach. If they contemplated, or ought to have contemplated, the consequences which have proximately followed, they are liable to pay damages accordingly.

(2) In determining what consequences the parties may be reasonably supposed to have contemplated the knowledge of the circumstances under which the contract was made must be, not merely an important, but the decisive consideration.

¹ *Curtis v. Innerarity*, How. 146.

² Code Civil, art. 1153.

³ P. 44, ed. 6.

(3) Notice of these circumstances enlarges the area of contemplation, and therefore the liability of the defendant in an action for breach of contract.

If these conclusions are adopted an immediate gain in simplicity follows, and one more standard is drawn from the man of ideal reasonableness. Nor is it believed that the rule would operate with objectionable severity. Even knowledge of special circumstances will only be creative of liability when the damage is proximately caused by the breach under those circumstances. No doubt in some cases the damages for breach of a scantily remunerated contract would be very heavy, but a similar disproportion is familiar in other applications of the law of damages. As Blackburn J. observed in *Horne's case*¹, 'the amount (of damages) may be unexpectedly large, but still the defendants must pay.' Nor is it clear why sympathy should be lavished in the ordinary run of cases on a defendant who has broken his contract with a full knowledge of the pecuniary or other disaster in which his breach will involve the plaintiff.

F. E. SMITH.

¹ L. R. 8 C. P. at p. 140.

[The first two paragraphs of s. 73 of the Indian Contract Act, intended no doubt to give the effect of *Hadley v. Baxendale* as understood by English and Anglo-Indian Courts in 1872, are as follows:—

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.—ED.]

*DE NICOLS v. CURLIER*¹ AND THE NEW GERMAN LAW.

THE incubus which in the shape of *Lashley v. Hog*² oppressed the minds of the Lords Justices has, in a resolute manner, been exorcised by the House of Lords in the judgment in *re De Nicols v. Curlier*.

It appears to me that we may from the latter unhesitatingly reduce two propositions, a negative and a positive one. The negative proposition, hitherto somewhat obscured by *Lashley v. Hog*, would be this, that the property relations between husband and wife must strictly be distinguished from the rights of succession, and will not be affected by the law of domicile of the parties at the time of death of either of them. The positive inference to be drawn would be this, that where the law of the matrimonial domicile, in the absence of a nuptial contract, establishes community of goods, and expressly or impliedly provides that a change of domicile shall not alter such relationship, then the English law will recognize the abiding continuation of the community of goods in accordance with that law.

Now the question will naturally arise whether we shall have to confine ourselves to this latter, comparatively narrow, proposition, or if the case will justify us in widening its scope so as to arrive at a more general and satisfactory principle, such as that foreshadowed by some text-book writers, especially Professor Westlake, viz. that the law of the matrimonial domicile, whatever (internationally recognized) system it may be founded upon, in the absence of a contract, governs the property relations of the parties until dissolution of the marriage.

None of the judgments in the House of Lords contains a direct utterance to that effect. Still, on examining them closer, we find that, though naturally varying in the trend of their reasoning, they all seem to have for their common basis this consideration, that it would be contrary to reason and common sense to hold that the law of the matrimonial domicile, settling the relations between the parties, should have a lesser effect than a contract embodying such law and entered into by them.

I may be allowed to quote a few of the dicta. Lord Halsbury:

¹ [1900] A. C. 21.

² (1804) 4 Paton 581.

'I am wholly unable to understand why the mere putting into writing the very same contract which the law created between them (the spouses), without any writing at all, should bar the husband from altering the contract relations between himself and his wife; when, if the law creates that contract relation, then the husband is not barred from getting rid of the obligation which upon his marriage the law affixed to the transaction' ([1900] A. C. at p. 26). After having disposed of *Lashley v. Hog* the Lord Chancellor concludes: 'We are at liberty to decide the question now in dispute in accordance with reason and common sense' (p. 30). Lord Morris agreed in these reasons (p. 36). Lord Macnaghten: 'If there is a valid compact between spouses as to their property, whether it be constituted by the law of the land or by convention between the parties' (p. 33). Lord Shand: 'As the Code enacted expressly all that a written contract required to provide' (p. 38). Lord Brampton: 'I pause here to emphasize the fact that this system (of the Code) operates upon no spouses unless by their mutual consent' (p. 41).

Proceeding from such views it can hardly be said to be a hazardous step to conclude that the law of the matrimonial domicile must be considered as being of an equal operative force to a marriage contract, taking its place where the same does not exist, and that, by a subsequent change of domicile, its effect on the property relations of the spouses is as little affected as an express contract would have been. Such conclusion, I submit, would support the general principle proposed to be established; with this practical result, that a husband and wife, immigrating to England, retain the property relationship provided for them by the law of the country where they were domiciled at the time of their marriage, whether such law created community of goods or any other definite and judicially recognized system, e.g. that of *usus-fructus maritalis*.

And this brings me to consider by way of illustration how in the light of such a principle of English law on the one hand, and the provisions of the new German law on the other hand, property relations between man and wife in this country and in Germany respectively, in the absence of a marriage contract, will, from an international point of view presumably, have to be treated, premising that the subject has become highly complicated by the circumstance that German legislation has entered upon its new course of substituting throughout the principle of nationality for that of matrimonial domicile¹.

¹ Compare my article in vol. xvi, no. 61, Jan. 1900, p. 88, LAW QUARTERLY REVIEW.

Let us first take the case of a German domiciled in England at the time of his marriage. The relevant provisions of the German law will be these: 'The property relations are governed by the German law where the husband at the time of marriage was a German subject (sect. 15, Introductory Act). The wife's property by virtue of her marriage becomes subject to the administration and usufruct of the husband. Such property includes property acquired by the wife during marriage¹' (sect. 1363, Civil Code). Suppose the wife of the German subject, as referred to above, inherits a sum of money from her father who has died intestate, and whose estate situate in Germany is in the hands of a German administrator. The latter will, in accordance with the law which dominates the property, be justified in paying the money over to the husband. The immediate consequence will be, that the wife will be deprived of the right which the policy of the law, under the dominion of which she and her husband have ever since their marriage lived, has deliberately extended to her. Whether she may eventually recover the money against her husband is a point which the Courts will have to determine. Should money devolve upon her from an English source, and through the agency of an English administrator, I submit that he will hardly be safe in paying it over to her, and taking his discharge from her, without having applied to the Court for directions.

Let us now consider the case of an Englishman domiciled in Germany and marrying an English woman whilst so domiciled. The Introductory Act provides: 'Foreign spouses having, at the time of their marriage, their domicile in Germany, their property relations will be governed by the law of the country to which the husband belongs at that time' (sect. 15). According to this provision the property of an English man and wife would be dealt with on the basis of English law. On the other hand, there is a section (27) in the same Act which must be read in conjunction with the former, and which is to the effect that, where, according to the law of the country to which the parties belong, German law is to be applied, the German law shall obtain. Now as the English law recognizes the law of the matrimonial domicile, i. e. in the hypothetical case under consideration, the German law, it would follow that the latter would, by German Courts, be treated as regulating the property relations between the husband and wife, with the same result as in the former case, viz. when such

¹ The right of administration and usufruct does not apply to *bona reservata*. Such are, generally speaking, the wife's paraphernalia, her earnings, and property coming to her earmarked by a donor or testator as *bona reservata*.

couple change their domicil to their native country the wife would, as far as the German law goes, be deprived of the benefit which English legislation has bestowed upon her. Will English Courts draw the consequences of *De Nicole v. Curlier*¹ in such a case?

In conclusion I may be allowed to observe that in my opinion the change which the German legislature has made, in discarding the criterion of matrimonial domicil, is not a happy one from an international point of view, in so far as such an extreme assertion of the national principle is naturally in itself bound to clash with the spirit of international jurisprudence. I may further remark that as the whole doctrine referring to the subject of property relations between husband and wife is more or less imbued with the fiction of the intentions of the parties, it must be more rational to conceive that the parties look to the laws of the country under which they live, and which they are presumed to know, than to those of a country from which they have separated themselves. And this applies with particular force to Germany, in so far as they may and, as a matter of fact, do lose their nationality through lapse of time. So that it would appear absurd to say that a born German, living in England and perhaps ceasing to be a German subject the day after his marriage with an English woman, would consciously or subconsciously look to the German law as governing the relations between himself and his wife.

JULIUS HIRSCHFELD.

¹ By the way I may remark that the German idea of domicil is more lax than that of English jurisprudence. The Code only requires a permanent residence and admits of several domicils simultaneously.

CONTEMPT OF COURT AND THE PRESS.

A LITTLE more quickness in the Government would cure this itch of libelling,' remarks Laud in one of his letters. Writing as he was of Prynne, of whom he was able to say, 'I thank my God I had his ears,' one wonders why he was not satisfied with the control over libellers then possessed by the Star Chamber. The Star Chamber and licenser of printing have disappeared, but there still remains over the press of this country one disciplinary jurisdiction almost as stern and far-reaching in its peculiar domain as that of the Star Chamber. It is that of the judges to punish those who print or publish matter declared to be in contempt of the Court.

This jurisdiction is so venerable and has been left so uncontrolled by the legislature that there is nothing more specific than the Bill of Rights to prevent an offender figuring in the pillory *sans* ears and nose if a judge were minded to follow Stuart precedent. It is moreover clear that, once in, neither Habeas Corpus nor Parliament could get him out until he had purged his contempt; as Mr. Gladstone had to admit in August, 1882, when Mr. Dwyer Gray, M.P., Lord Mayor of Dublin, was sentenced to three months' imprisonment, fined £500, and made to find bail in £10,000 for his good behaviour for comments in the *Freeman's Journal* on the conduct of a Dublin jury. Subsequently, on October 24 in the same year, in the debate on a motion for the appointment of a select committee to enquire into the matter, Mr. Gladstone promised to introduce a measure dealing with and altering the law as to contempt of Court (Hansard, 3rd series, vol. 274, col. 36); but no legislative proposals were in fact ever made.

The case of Mr. Dwyer Gray aroused criticism chiefly owing to the severity of the punishment; but cases involving some doubt as to whether the jurisdiction to commit has been properly invoked, especially if the punishment is well deserved, seldom receive adequate notice. Certainly the recent case of *Reg. v. Gray*¹ tried before the Lord Chief Justice and Grantham and Phillimore JJ. on March 27 and 28, owing to the peculiar and unusual nature of the contempt alleged, deserves more attention than it has as yet received.

¹ [1900] 2 Q. B. 36, 96 L. J. Q. B. 502.

In this case no one could feel the least grain of sympathy with the offender for his vulgar attack upon the judge, but the general acquiescence of the press in the law as laid down by the Lord Chief Justice and agreed to by Grantham and Phillimore JJ. is somewhat surprising. The *Times* alone showed a lurking suspicion that there were possible dangers in the application of the principles laid down by the Court. No one can fairly accuse our present Bench of an undue desire to amplify the judicial jurisdiction. The breath of public sentiment permeates the Bench as freely as it does Parliament, and the country is, for the most part, content to allow the judges whatever legal means the law permits for protecting their reputations, confident that there is small likelihood of its being abused. Still there is a real danger in leaving matters of criminal procedure merely to the discretion of a judge, as, for instance, the power to order corporal punishment for certain offences. So in matters of contempt; a jurisdiction which enables a judge to commit to prison a subject of the Queen, without the verdict of a jury and without appeal; to fine him either as an additional or substitutional punishment, without limit of amount, for an offence which has never been defined by statutory enactment, is a jurisdiction which no one will deny requires the closest scrutiny whenever it is exercised. Another danger is due to the fact that owing to the vague nature of the offence the decisions of the judges as to the law of contempt form precedents which are not merely declaratory but creative of the law; and every extension of this peculiar jurisdiction diminishes the area within which public opinion can operate to control it. It should also be remembered that the jurisdiction is one often exercised in the colonies where public opinion is either non-existent or powerless to act as an effective force to control the judiciary.

The strenuous effort which the judges of the eighteenth century made to keep the question of libel or no libel under their control as matter of law is well known; and the attack of Junius on Lord Mansfield in the preface to the collected edition of his letters was due to the prominent part taken by Lord Mansfield in this controversy. The passing of Fox's Libel Act in 1792 put the matter at rest, and since that time, with the sole exception of such libels as are contempt of Court, juries are the only arbiters of the question whether any given words are libellous or not. When, however, a libel on a judge is also a contempt of Court, the offender, being in this case proceeded against by motion and not by indictment or information, is deprived of the protection which Fox's Act would otherwise give him, as the Act only applies where proceedings are taken either civilly or by indictment or information. When the

alleged contempt is merely a libel on the judge, without any reference to pending litigation and having no tendency to prejudice the course of justice, there seems no reason why the right to be tried by a jury given by the statute should be denied the accused. It is the failure to keep distinct the judge as an individual from the judge as a Court, exercising purely judicial functions, which is at the root of what confusion exists in the law on the subject; and it was the failure to observe this distinction as drawn in all the recent leading cases which led to what I submit is the erroneous decision of the Court in the above case of *Reg. v. Gray*.

The facts of the case are shortly these. A man was about to be tried at Birmingham Assizes for uttering obscene words and selling an obscene libel contained in a book. Prior to the commencement of the case the judge addressed the representatives of the press at some length, pointing out that there was no protection given to a newspaper for the publication of obscene matter, and warned them that, if he found his advice disregarded, he should make it his business to see that the law was enforced. The case was then tried, and the accused was found guilty and sentenced the same day. On the afternoon of the following day there appeared in a Birmingham evening paper an article commenting on the judge's address to the representatives of the press. It contained the following passages:—'No newspaper can exist except upon its merits, a condition from which the Bench, happily for Mr. Justice —, is exempt.' 'Mr. Justice — would do well to master the duties of his own profession before undertaking the regulation of another.' The rest of the article was vulgar personal abuse and scurrilous comment inexcusable under any circumstances, but in no way reflecting on the judge's judicial capacity. The judge referred to took no action in his own Court at Birmingham with reference to the article, but the Attorney-General some days after its appearance took proceedings against the publisher before a Divisional Court in London. Although no special point was made of the sentences I have quoted, the article must be taken, for the purposes of the following argument, as having impugned the fitness of the judge for his post as well as having a tendency to bring him personally into contempt. The writer might have been prosecuted criminally or sued in a civil action. These are remedies available to every subject in such a case and the only ones available. Does the law give our judges jurisdiction in such a case to proceed against the offender summarily without a jury and without an indictment or information formulating a strict charge? In other words, has a judge for the protection of his private character or judicial reputation any rights or remedies not possessed by the ordinary citizen?

It must be noticed that when the article appeared there was no pending litigation. The prisoner had been tried, found guilty and sentenced on the previous day. Again, the comments contained in the article did not in any way deal with matters in litigation, but only referred to the judge's address on the responsibilities of reporters. Such an address, although, doubtless, on some occasions necessary, and, at any rate, always harmless, is no more within the Queen's Commissions of Oyer and Terminer and Gaol Delivery than are announcements of the reported relief of beleaguered towns and criticisms on the lack of patriotism shown by eminent clerics, which have lately been made from the Bench. It is, therefore, far from clear, unless stress is laid on the two vague puerile sentences which I have quoted from the article, that 'a scurrilous abuse of a judge in his character as a judge—scurrilous abuse in reference to his conduct while sitting under the Queen's Commission' or a 'scandalizing of the Court' was perpetrated, as the Lord Chief Justice declares in his judgment. It is manifest when the report of the case is read that the *graveness* of the offence in the minds of the judges was the vulgar *personal* attack on the judge. However, as the sentences I have quoted, if taken literally, do refer to the judge in his character as a judge, and the article undoubtedly constitutes the offence of 'scandalizing the Court,' as such conduct is termed by the Lord Chief Justice—using the words of Lord Hardwicke of the middle of the eighteenth century—the simple issue, therefore, to be considered, is whether the offence of 'scandalizing the Court' is punishable as contempt of Court in the present day.

In the first half of the eighteenth century it would seem from the definition of contempt of Court given in Viner's Abridgement, that 'a despising the dignity' of the Court was then considered to be contempt. When, however, the older cases are examined which are supposed to justify this view the facts show that the words which were held to 'scandalize' the Court were uttered concerning the Court and to its officers when serving process of the Court upon the offender. The offence would therefore come under the well-recognized class of contempt known as that of opposing or obstructing the Court when acting strictly within its judicial province by conduct tending to interfere with the administration of justice. Such are the quaint cases of *Witham v. Witham* (3 Ch. Ca. 41) in the year 1669, where the Master of the Rolls resented what he called the familiarity of a defendant on whom one of his orders was served by the plaintiff, and of *Phillips v. Hedges* (Cooke's Reports, 132) in 1737, where the Chief Justice attached the defendant for damning him and his Court and saying 'that he neither cared for him or them' when service of process was made upon him in the

action. Indeed, in the old case of *Roach v. Hall* (2 Atk. 471) where Lord Hardwicke says, 'One kind of contempt is scandalizing the Court itself,' the statement is clearly *obiter*, as the matter for which the printer then was committed had reference to a case then pending in the Court. The same objection may be made with regard to the case of *Reg. v. Almon* (Wilmot's Opinions, 243) relied on by the present Lord Chief Justice when delivering his judgment in the recent *Daily Argus* case. *Reg. v. Almon* came before Chief Justice Wilmot in 1765, but the prosecution was dropped and no judgment was in fact delivered. The Chief Justice, however, having apparently only heard the argument for the Crown, wrote a very learned opinion on the general law of contempt. The contempt charged against Almon was that he had published a libel on the Court of King's Bench accusing it of a deliberate intention to defeat the Habeas Corpus Act, and if the case had been proceeded with he would doubtless have been committed. Such an accusation, if persisted in, would destroy public confidence in the Courts, and is clearly a more serious matter than mere personal abuse of a judge, however violent. It also falls into another class of offence, and even if the opinion of Chief Justice Wilmot is to be taken as sufficient authority for the proposition that it is contempt of Court to charge a judge with an intention to deny justice, the case falls short of being an authority under any canon of legal reasoning for declaring that violent abuse, however scurrilous, of a judge is also contempt at law. Wilmot C.J., in language expressing the high Tory conception of kingship, says that 'a libel on the Court is a reflection on the King,' and that the object of attachments in such cases was 'to keep a blaze of glory around' the Court. The one may have been a fact and the other sound policy in the early years of George III, when Wilkes in the *North Briton* published the grossest libels on both the King and his Courts with equal indifference; but the circumstances of our times call for no such insistence on the theoretical presence of the Sovereign in our Courts of law.

The above cases, I think, sum up all the authority which can be marshalled to suggest that 'scandalizing the Court' is punishable as contempt. It is to be observed that not one is a decision to the effect that conduct unaccompanied by circumstances showing an interference with the administration of the law in an actual case pending in the Courts can be punished as contempt. Not only is there a lack of authority for any such conclusion, but it will be seen that in recent times the authorities to the contrary are both numerous and overwhelming.

Before dealing with these authorities I cannot do better than

quote the words of the late Sir George Jessel and Lord Justice Bowen to show the general principles which should guide the judges in administering the law of contempt of Court. Sir George Jessel in a judgment delivered in 1876 (46 L. J. Ch. 375) says : 'This jurisdiction of committing for contempt being practically arbitrary and unlimited should be most jealously and carefully watched and exercised, if I may say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is no other mode which is not open to the objection of arbitrariness and which can be brought to bear upon the subject.' Equally pertinent is what the late Lord Justice Bowen said only a few years ago : 'The object of the discipline enforced by the Court in case of contempt of Court is not to vindicate the dignity of the Court or the person of the judge but to prevent undue interference with the administration of justice' (*Helmores v. Smith*, 35 Ch. D. 449). These are the opinions of two of our most distinguished judges in modern times, famed not only for their grasp of legal principles but also for their power to apply long-settled principles to the exigencies of modern society under conditions never contemplated at the time they were framed.

It will be found from the cases to which I am about to refer that, as Lord Justice Bowen says, the whole object of the law of contempt of Court is to prevent interference with the administration of justice in cases *pending* in the Court. It is a weapon which may not be used by the Courts for any other purpose. To obtain redress for a libel a judge must have recourse to the ordinary civil tribunal or prosecute the offender criminally just as a Prime Minister is obliged to do. Indeed it is only a few years since Lord Salisbury was compelled to take such action. To show how necessary it is that a case must be pending before the Court has jurisdiction, it suffices to refer to *Onslow's* and *Whalley's* case (L. R. 9 Q. B. 219), one of the contempt of Court cases which fringed the famous Tichborne trials. Messrs. Onslow and Whalley had made public speeches on the eve of the trial of the Claimant for perjury, alleging that there existed a conspiracy against him, and that he could not get a fair trial. The speeches were delivered in London between the finding of a true bill by the grand jury and the actual trial, and it was contended that as the trial had not commenced no contempt had been committed. Lord Cockburn, however, decided that the case was 'pending' because a true bill had been found, and therefore the objection was unsound. The words used—suggesting that the judges who were to try the Claimant would not give him a fair trial—were certainly 'a scandalizing of the Court' in Chief Justice Wilmot's sense. Lord Cockburn suggests no such ground for his

judgment, but says: 'It is clear that this Court has always held that comments made on a criminal trial or other proceedings, *when pending*, is an offence against the administration of justice and a contempt of the authority of this Court' (see p. 227 of the report). If a Court was ever 'scandalized' in a legal sense it was by the defendant in *Skipworth's* case (L. R. 9 Q. B. 230), another contempt of Court prosecution arising out of the Tichborne litigation. Mr. Skipworth in a public speech at Brighton had said: 'I could see there was no chance of justice being done by those four judges from the first.' 'I say that Lord Chief Justice Cockburn was not the fit person to try anything in connexion with the case.' Again, there is no suggestion that the contempt of 'scandalizing' the Court had been committed; but, instead, we have the following very conclusive words of Mr. Justice Blackburn, who delivered the judgment of the Court:—'The phrase, contempt of Court, often misleads persons not lawyers, and causes them to misapprehend its meaning and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the judges and protecting them from personal insults as individuals.' And he, again, in explaining how the Court's jurisdiction arises, explains that the offence is committed '*when an action is pending* and anything is done which has a tendency to obstruct the ordinary course of justice or to prejudice the trial.' The same test was also rigidly applied by Lord Esher, the late Master of the Rolls: 'All that is necessary is that it should be a contemptuous interference with *judicial proceedings* in which the judge is acting as a *judicial officer*.' (*In re Johnson*, 22 Q. B. D. at p. 71.)

The above authorities would seem to be sufficient for my purpose, but there are two quite recent cases so directly on all fours with that of the *Daily Argus* that the consideration of the matter would be incomplete without a reference to them.

The first was a special reference in 1893 to the Privy Council in relation to the action of the Chief Justice of a Crown colony¹, and the matter was heard by a very strong committee consisting of Lord Herschell L.C., Lords Coleridge L.C.J., Watson, Esher M.R., Lord Justice Bowen and other judges. The Chief Justice of the Crown colony in question had committed to prison for contempt of Court the publisher of a paper in which the following comments upon him had appeared. 'Penny readings, daughters of Ruth, Mrs. N—— J——, and W. C. T. U. have all felt the fostering touch of his strong hand.' 'Some cynic has said "Every man has his price." It is assuring to know that the "fount of justice in

¹ [1893] A. C. 138.

this colony is above the price of even one dozen pineapples.” ‘The law allows six weeks’ leave of absence, and Mr. — should be subservient to that law if to no other.’ ‘Just suppose we had a fool for a Chief Justice.’ ‘We colonists have had many camels of incompetence forced down our throats.’ With much more of a similar scurrilous nature.

Now it can hardly be said that these libels do not out-herod those in the recent *Daily Argus* case, but although the present Lord Chief Justice and Lord Justice Rigby, then counsel in the case, argued at the bar that the words constituted a contempt of Court, they failed to establish their contention. The Court unanimously made the following report: ‘That the letter, though it might have been made the subject of proceedings for libel, was not in the circumstances calculated to obstruct or interfere with the course of justice or the due administration of law, and therefore did not constitute a contempt of Court.’ The last case to which I shall refer is also one which was brought before the Privy Council as recently as last year, on appeal from a Crown colony, and is one of considerable importance as the applicability of the summary process for dealing with the offence of ‘scandalizing the Court’ was considered under that name. Here, again, the article which appeared in the colonial paper was grossly libellous and scandalously vindictive, as the following quotations show:—

‘Mr. — is reducing the judicial character to the level of a clown.’ ‘He has apparently been too wrapped up and intermingled with personal disputes and squabbles of a questionable character to allow him to deal honestly and impartially with questions which come before him to be judicially settled.’ ‘A man . . . narrow, bigoted, vain, vindictive, and unscrupulous.’

Now this language, as the language in the last case, is clearly within the definition of the offence of ‘scandalizing the Court,’ as laid down by the present Lord Chief Justice in the *Birmingham Daily Argus* case. His words in describing the editor’s offence were: ‘It is an article of scurrilous abuse of a judge in his character of a judge—scurrilous abuse in reference to his conduct while sitting under the Queen’s Commission, and scurrilous abuse published in the town in which he was still sitting in discharge of the Queen’s Commission.’

All these elements were present in the last Privy Council case to which I have referred, but the article was held not to amount to a contempt of Court in any legal sense. There were present Lords Watson, Macnaghten, Morris and Davey, and the unanimous judgment of the Committee was delivered by Lord Morris, who used these words:—

'It' (the power to commit for contempt) 'is not to be used for the vindication of a judge as a person. He must resort to an action for libel or criminal information. Committal for contempt is a weapon to be used sparingly and always with reference to the interests of the administration of justice. Hence when a trial has taken place and the case is over, the judge or the jury are given over to criticism . . . *Committals for contempt of Court by scandalizing the Court have become obsolete in this country.* Courts are satisfied to leave to public opinion attacks or comments derogatory or scandalous to them.' (See [1899] A. C. 549.)

A judgment in such clear terms is a fitting conclusion to the long process of evolution by which the patriarchal discipline of the judges in matters of contempt, as administered in Tudor and Stuart times, has become a discipline rigidly confined to conduct which tends to obstruct or to prejudice the due administration of justice in a case pending in the Courts. These later authorities were not referred to by the Lord Chief Justice in his judgment in the *Daily Argus* case, which, I submit, runs counter to the whole stream of modern decisions, and puts back the law to the point where it stood in the reign of Charles II, when a litigant was committed to prison for 'undue familiarity' towards the judge. It is, however, to be hoped that the fact that the case was not argued will be recognized and that the precedent will not be followed. The gross vulgarity of the article in the *Daily Argus* appears to have led both Court and counsel away from the legal aspect of the matter. But English law is like the sun, made to shine on the just and unjust; and experience has shown that rules or limitations of rules, slowly developed by a long course of judicial decisions, cannot wisely be departed from, although in individual cases the morally guilty may be declared legally innocent. Judges have little reason to be concerned about outside criticism. The Bar, as a judge said on his retirement, is a fair and generous profession and has never failed in loyalty to the Bench, and therefore a judge need fear no criticism that does not emanate from it. The Lord Chief Justice in his judgment in the *Daily Argus* case rightly said, 'the liberty of the press is no greater and no less than the liberty of every subject of the Queen.' The authorities to which I have referred, I submit, show that the privilege of a judge for the protection of his personal and judicial reputation is no greater and no less than that of every subject of the Queen.

ARTHUR E. HUGHES.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

La Conférence de la Paix (extrait de la Revue générale de Droit international public). By G. DE LAPRADELLE. Paris: A. Pedone. 1900. 8vo. 202 pp.

THIS is the most satisfactory account which has yet been written of the Hague Conference: 'without o'erflowing full,' and critical rather than rhetorically eulogistic. The author has made himself acquainted with most of the very numerous monographs and articles which have appeared upon the subject, and, what is more important, has studied at first hand the *procès-verbaux* and other documents printed for the use of the delegates, which give a far more accurate idea of what passed at the Hague than can be gathered from the meagre blue-book which has been presented to Parliament. He is also well aware of the by-play of divergent political interests which prompted so much of the action of the plenipotentiaries, and is thus in every way qualified to estimate the real value of what was achieved by them.

M. de Lapradelle sees, of course, that the Conference was fore-doomed to failure: 'en s'isolant des problèmes politiques, auxquels tout le monde pensait, pour tracer en l'air des règles applicables, au premier chef, à ces mêmes problèmes, les délégués s'interdisaient d'aboutir.' He traces, throughout the labours of the delegates, the disastrous consequences of a constant effort to appear to accomplish something, under impossible conditions. We are shown how the first committee glides from the limitation of armaments, its primary object, into schemes for the civilization of warfare, without arriving at any definite conclusions, except upon such minor and somewhat speculative points as the employment of projectiles from balloons, of noxious gases, and of expanding bullets. Even upon these points, opinions were by no means unanimous. The task of the second committee was to extend the principles of the Geneva Convention of 1864 to maritime warfare, and to revise the draft of the Brussels Conference of 1874, upon the laws and customs of war. M. de Lapradelle thinks that the Conventions prepared by the committee, and accepted by the Conference, upon these two subjects are inferior to the drafts prepared in 1868 and 1874 respectively. Only obvious matters were debated with care, while topics giving rise to any serious difference of opinion, such as the bombardment of open coast towns, and the right of non-combatants to resist invasion, were studiously avoided: 'à tant chercher l'entente, la Conférence perd toute l'utilité.' The President of the committee, M. de Martens, was obliged to admit that its members 'se sont séparés en laissant exister le vague complet sur toutes ces questions.'

On the work of the third committee, for the peaceful solution of inter-

national disputes, M. de Lapradelle has much to say, and departs somewhat from his usually impartial attitude. He thinks that Arbitration is favoured by England, because she knows how, 'par des stratagèmes multiples,' to turn it to her own interest, and by the United States, which can always protect themselves behind the Monroe doctrine from any of its inconveniences! Germany prefers to trust to the 'mailed-fist,' and the minor States are distrustful of anything which looks like intervention in their affairs, even when proposed by 'des puissances purement désintéressées, comme la France!' His remarks upon the difficulties in the way of obligatory Arbitration (found by the Conference insuperable) are, however, much to the point (pp. 134-147); as in his criticism upon the structure of the so-called 'permanent court' (pp. 158-167), 'Ce n'est pas à la création d'une cour d'arbitrage, mais à celle d'un corps d'arbitres, qu'arrivent en réalité ces projets.' With the proposed Code of Procedure, M. de Lapradelle is dissatisfied. The prestige and utility of Arbitration he thinks will be much diminished by provisions which tend to make the award a compromise rather than a judgment, a closing of disputes rather than a declaration of the law (p. 177); citing with approval the saying of Mr. Hobbs, one of the American delegates, that 'nothing is settled unless it is settled right.'

The 'Acte final' he contrasts with that of Vienna, as in itself a mere 'bordereau de conventions à adopter,' binding no one to anything. This was no doubt the case, but binding signatures have since come in much more numerous than was to be expected, and ratifications are likely soon to be exchanged, between perhaps all the Powers, subject to some slight reservations, of the three Conventions, and, between most of the Powers, of the Declarations also. These documents contain, however, much less in the way of binding engagements than is commonly supposed; and M. de Lapradelle gives good reasons for his opinion that the effects of the Conference will be felt rather in the domain of politics than in that of law.

T. E. H.

[Curiously enough, the most definite result of the Conference would seem at present to be the *de facto* addition of a new restrictive rule or custom to the laws of war, namely, the prohibition of expansive bullets; although the rule proposed at the Conference was not unanimously adopted, and is not yet formally binding on any one.—Ed.]

Die Rechtskraft des Internationalen Rechtes und das Verhältniss der Staatsgesetzgebungen und der Staatsorgane zu demselben. By WILHELM KAUFMANN. Stuttgart: Ferd. Enke. 1899. 8vo. viii and 126 pp.

THIS learned and ingenious monograph might perhaps have been more descriptively entitled *Die Rechtskraft der Verträge*, dealing, as it does, almost exclusively with the modes in which rights arising under Treaties may be created, made available, and extinguished. The five Parts of the book treat successively of the subjects of such rights; of the creation of such rights; of the operation of Treaties and the circumstances which may interfere with their operation; of the application and interpretation of Treaties; and of the international execution of judgments. Dr. Kaufmann's acquaintance with the literature of all that bears upon these somewhat recondite questions is remarkable. He is as familiar with decisions of the Supreme

Court of the United States as with those of Courts in France, Germany, or Switzerland, but, perhaps not unnaturally, has more difficulty in appreciating the views of English lawyers upon the subject, and is too much inclined to denounce as erroneous, because not in accordance with his theory, principles which have won general acceptance even in the countries with the legal ideas of which he is most in sympathy.

The value of the work is not a little affected by what is in our opinion an initial mistake. Dr. Kaufmann begins by laying down that individuals, as well as States, may be 'Rechtssubjecte' in International law; and we find, as we go on, that he does not seem to have fully grasped the distinction between the international obligations of the States which are parties to a Treaty, and the rights and duties which may, under the Treaty, accrue to private individuals. The extent to which a Treaty is directly available to suitors, in the Courts of a country which is internationally bound by it, depends, of course, upon the constitution of the country. In the United States, as in France and some countries of the Continent, a duly promulgated Treaty is the law of the land. In England this is not so. Whence consequences follow which seem to perplex our author. Where a Treaty takes its place, according to date, as the equivalent of a legislative act, how is it affected by subsequent legislation on the part of one of the contracting States, inconsistent with its provisions, or by a Treaty, similarly inconsistent, subsequently made by one of those States with a third Power? What is the effect of a Treaty made by a federal government upon the laws inconsistent with it which have been made by one of the federated governments, within the limits of its constitutional powers? These questions are discussed at great length and with much ability, but also with some misapprehension of the American authorities, and with a bias in favour of a hierarchical gradation of laws, which would nullify legislation affecting to override the higher obligation of an antecedent Treaty. Even here, however, Dr. Kaufmann is compelled to admit that the practice on the Continent, as well as in the United States, is in accordance with the maxim '*lex posterior derogat legi priori*,' maintaining at the same time that '*dieser Standpunkt ist grundsätzlich unrichtig und unhaltbar*.' He is naturally pleased with the language of Lord Stowell (guarded as it was) as to the prize-court sitting as a Court of the Law of Nations only. The book is well worth reading. T. E. H.

Elphinstone's Introduction to Conveyancing. By Sir HOWARD WARBURTON ELPHINSTONE, Bart., JAMES W. CLARK, and ARTHUR DICKSON. Fifth Edition. London: Sweet & Maxwell, Lim. 1900. 8vo. xxxv and 566 pp. (14s.)

THIS useful work, which is almost indispensable to students and is not by any means despised by the best practitioners, is now so well known as to need no description.

The present edition appears to be every wit as sound as its predecessors and has been well brought up to date, though it was evidently published before the recent case of *Re Duchess of Marlborough*, which has drawn attention to the fact that a man may have two widows co-existing in whose favour he may appoint a jointure rentcharge under the common form power.

A difficulty which the editors seem to suffer from is to keep the book short and yet well noted up. We hope that in future editions this will be borne in mind, for there is no other book in which the fundamental

principles of conveyancing can be so readily studied, and it would be a mistake to obscure these by a too heavy sprinkling of cases.

It is understood that this book has not yet been adopted by either Oxford or Cambridge for regular use in their respective law schools. The sooner this is done we think the better, for if any book is capable of giving life and reality to the dry bones of real property law this is the one. The student should of course have some book of precedents by him when reading, and for this purpose Clark's 'Students' Precedents in Conveyancing' is referred to throughout the book.

This edition contains a new chapter giving a short account of registration of title under the Land Transfer Acts.

B. L. C.

The Commercial Code for the German Empire. Translated from the official text by BERNARD A. PLATT. London: Chapman & Hall, Lim. 1900. 8vo. xii and 370 pp.

IF this translation of the New German Mercantile Code was intended as a joke in the nature of the 'Manuel de la Conversation' which, for some time, has wearied the readers of 'Punch,' Mr. Platt ought at least to have imitated the literal accuracy of Mr. Punch's contributor. Mr. Platt aims at being literal, no doubt, but his evident disinclination to take trouble of any kind frustrates his good intentions. 'The translation has been made as literal as is compatible with using the simplest possible English'—so runs the preface. A few specimens will show the simplicity of the English, and it is hardly necessary to add that these specimens, far from being literal, are mere distortions of the original text.

'Art. 57. An attorney must abstain from making use of any addition to his signature giving the idea of any procuration; he must only add a post-script to his signature explanatory of his holding and power of attorney.'

'Art. 97. A broker is not authorized to take a payment or any other thing owing through a contract.'

'Art. 356. When a debt guaranteed by pledge, surety, or any other manner appears in a current account, recognition of the settlement of the account does not prevent the creditor from trying to get paid by the guarantor, even if the amount credited to him in the account and the debt balance each other.

'If a third person makes himself jointly and severally liable with another for a debt brought into a running account, enactments of par. 1 for the recovery of a debt are applicable to him by analogy.'

'Art. 367. When a security payable to bearer which has been stolen from its owner is lost, or has disappeared in some other way, or transferred or pawned to a trader who follows the business of a banker or changer, the good faith of the latter cannot be recognized if at the time of transfer or pawn the loss of the document has been published in the *Deutsche Reichsanzeiger*, either by public authority or by him who is bound to do so by the terms of the document, and if a year has not elapsed from the end of the year in which such advertisement took place . . .'

Does Mr. Platt expect any reader, learned or unlearned, to understand any of these passages? Does he himself understand them? But there are other passages less unintelligible, though not less inaccurate. Thus we are told by art. 179 of the translation that 'shares may be made out to bearer, or may be made not transferable,' whilst according to the true and literal meaning

¹ The punctuation of these extracts is Mr. Platt's.

of the German text share certificates may be issued to bearer or to named persons ('auf den Inhaber oder auf Namen lauten'). Again, art. 180 of the translation, which states that 'the capital of the company must amount to at least 1,000 marks,' entirely misrepresents the original section, which in no way refers to the capital of a company, but prescribes a minimum amount for each *share* in a company. The expression 'Werthpapiere,' which is a well-known technical term corresponding to the English term 'negotiable instruments,' is mistranslated in every place in which it occurs; being sometimes rendered by 'valuables' (arts. 1, 93, 363, 369), sometimes by 'Paper Securities' (arts. 381, 383, 400, 429, 462), and once by 'Securities' (art. 261). Whilst thus one technical German term is reproduced by three different English expressions, the English term 'agent' is, on the other hand, used as the equivalent for three German expressions entirely distinct from one another, each of them being moreover defined by the very code translated by Mr. Platt, these expressions being 'Prokurist' (defined by arts. 49-51), 'Handlungsagent' (defined by art. 84), and 'Kommissionär' (art. 383). These are only a few examples of the hopeless ignorance and gross carelessness of the author of this translation, but they suffice to show that serious criticism would be wasted on him.

As it may, however, be hoped that some day a more competent person will undertake the task of translating the German Mercantile Code, a few hints as to some of the essential requirements for the usefulness of such an undertaking will not be out of place. To begin with, the bare text of the code is not intelligible without an introduction showing the relation in which it stands to the Civil Code and to other statutes on subjects connected with Mercantile Law which are in force in Germany. The new code—to a greater extent even than the code replaced by it—must be read together with the general law on the subjects with which it deals. Moreover, there are some branches of mercantile law which still remain outside of the code. Thus, whilst the Mercantile Code deals with private partnerships and companies limited by shares, the limited liability partnerships introduced by the Statute of 1892 (amended in 1898) are not referred to in any way. A German lawyer is of course expected to know these things, but an English reader who refers to the code, if left without any guidance on the subject, will necessarily be misled.

A second point which a translator must not overlook is the fact that the readers who use his work, whether lawyers or merchants, are necessarily laymen as regards the law which it contains, and therefore not acquainted with the cross-references which must necessarily be read into every code. Some indication of the sections which explain other sections is therefore absolutely indispensable.

There is finally a third point which in the case of an English translation is of importance. There are certain expressions corresponding to continental expressions which are used in English-speaking countries though not in England itself, and which, in the absence of appropriate terms belonging to English law in the narrower sense, seem preferable to new expressions or circumlocutions. Thus, for instance, the expression 'special partner,' which is familiar to American lawyers, is a much better translation for the German term 'Kommanditist' than any newly-invented term.

The writer of this notice feels that he has given it more space than it properly deserves, but literary quackery is the worst of all quackeries, and the natural impulse to expose it when it occurs is too strong to be resisted.

E. J. S.

The Law and Practice as to Receivers appointed by the High Court of Justice. By WILLIAM WILLIAMSON KERR. Fourth Edition. By PERCY F. WHEELER and CHARLES BURNET. London: Sweet and Maxwell, Lim. 1900. 301 pp. (10s.)

KERR on Receivers is too well-known a work to require description or much comment. It surprises one to learn from the preface that nine years have elapsed since the third edition appeared. The decisions since the date of that appearance seem to be all duly noted in the fourth edition in their proper places, and there are many of them. In many branches of the law as to receivers, for instance that of Equitable Execution, the law cannot be said to be settled, and the practice is altered, if not amended, from day to day. The editors bring up the alterations to March 12, 1900, the date of their preface. The preface says that 'in the present edition no alteration has been made in the arrangement of the work'—and no one will complain on this score—nor has the original text been touched, except so far as the incorporation of the later decisions and the changes in the practice have rendered this unavoidable. A little editing of the original text would perhaps improve the book, as it rather worries one to see 'the Court of Chancery' referred to in 1900 as if it were an existing tribunal. This, however, is only a small matter, and does not prevent the book from being one which will be found to be of the greatest assistance to the ever increasing number who seek a remedy in the appointment of a receiver.

F. E.

Limitations of Actions against Trustees and Relief from Liability for Technical Breaches of Trust. By FRANCIS A. ANGLIN. Toronto: Canada Law Book Co. 1900. 8vo. xxxi and 217 pp.

THIS work gives a concise and clear view of the present state of the law, in the English-speaking provinces of the Dominion, on the subjects named in the title. The cases—English, Irish and Canadian—are brought to date and are well handled. In an Appendix will be found the recent provincial legislation in relief of trustees (following the model of the Imperial Acts) together with the principal local statutes which bear on limitation of actions. A very full index concludes the volume. Written in an easy style, Mr. Anglin's book should commend itself as well to lay as professional readers.

T. B. B.

The Power and Duty of an Arbitrator. By FRANCIS RUSSELL. Eighth Edition. By EDWARD POLLOCK and the late HERBERT RUSSELL. London: Stevens & Sons, Lim., and Sweet & Maxwell, Lim. 1900. La. 8vo. xlvii and 579 pp. (30s.)

No better editor of Russell on Arbitration could be found than the learned Official Referee who has made himself responsible for this edition. In preparing the text he had the assistance of the late Mr. Herbert Russell, and in preparing the forms that of Mr. Ernest M. Pollock. The result is an edition that appears to be greatly superior to its forerunners. A great deal of the matter in the former editions has been rendered obsolete by the passing of the Arbitration Act, 1889, and that part has been omitted or cut down, with the result that the bulk of the book is considerably reduced. Mr. Pollock and his coadjutors seem to have done their work with skill and diligence and the text leaves nothing to be desired.

The forms, sixty-two in number, are most complete and will be found of the utmost value. The weakest part of the work is perhaps the index, which might with advantage have been made more analytical and discriminating. For instance, such a reference as 'Notice—meeting in reference, of, 119, 123, 139, 407' may involve looking up three places before the one required is discovered. The references should be subdivided into 'how to be given,' 'peremptory for each meeting,' 'forms of,' &c. Our equanimity has been not a little disturbed in our endeavours to find quickly various points upon which we have desired to test the work. When found they have all stood the test.

It is unfortunate (though of course the editors are in no way to blame) that the edition left the printer's hands too late for the inclusion of *Knowles v. Bolton Corporation* [1900] W. N. 73, overruling *Mackenzie v. Ascot Gas Co.* (now fully reported [1900] 2 Q. B. 253). If the editors could have seen a full report of *L. & N. W. R. Co. v. Walker*, they would have realized that the decision of the House of Lords does not merely affirm that of the Court of Appeal. The opinions of the Lords were based on grounds that were scarcely noticed in the Court of Appeal.

In conclusion we may add an expression of regret that the Arbitration Act, 1889, was not a more sweeping and better drawn measure. Had it cleared away all the various modes of proceedings in arbitrations under various statutes, provided a complete code for procedure and given the Court more general powers for getting over difficulties, Russell on Arbitration might have been much further reduced in size and arbitrations greatly facilitated. Some of the decisions on the Act of 1889 show how little attempt was made by its framers to provide for future difficulties.

The profession owe a debt of gratitude to the learned Official Referee and those who have helped him in the production of the new edition of the standard work on Arbitrations.

Company Precedents. Part III. Debentures and Debenture Stock.
By F. B. PALMER. Eighth Edition. London: Stevens & Sons,
Lim. La. 8vo. xlviii and 635 pp. (21s.)

By this work Mr. Palmer may be said to complete the cycle of his 'Company Precedents.' In these Precedents he has furnished the legal and commercial world with forms for every stage and every vicissitude in the life of a company, from the cradle to the grave and beyond it in the resurrection of reconstruction. One department of a company's activities has of late, however, assumed such colossal proportions—to wit, borrowing on debentures and debenture stock—that the author has, not unreasonably, deemed the subject deserving of a separate volume. The debenture is indeed a notable example of the expansion of our law under the stimulus of commercial necessities; for practically the whole of the law and practice comprised in this volume has originated in this manner. Like all Mr. Palmer's books it is primarily a book of forms, but the introductions and notes supply everything that the practical man is likely to need, and are illuminated by Mr. Palmer's unique experience. The author may be allowed to feel some natural gratification that *Bechuanaland Exploration Co. v. London Trading Bank* [1898] 2 Q. B. 658, has affirmed the negotiability of the debenture to bearer, a view for which he has so long and strenuously contended.

Company Precedents. Part II. Winding-up Forms and Practice. By F. B. PALMER assisted by F. EVANS. Eighth Edition. London: Stevens & Sons, Lim. La. 8vo. lxxxiv and 1174 pp. (32s.)

ANOTHER edition—the eighth—of these Winding-up Forms after a lapse of only three years testifies to their continuing popularity and makes comment almost superfluous. In this labyrinthian subject in which new practice rules, new scales of fees, new forms of orders and affidavit for ever amaze the bewildered practitioner, his only salvation lies in a book of this kind well up to date in all the niceties of practice. If a suggestion may be made, it is that rather more space should be given to voluntary winding-up, now the favourite mode of liquidation.

A Treatise on the Principles of the Law of Compensation. By C. A. CRIPPS, Q.C. Fourth Edition. London: Stevens & Sons, Lim. 1900. lxiii and 516 pp. (25s.)

MR. CRIPPS'S book is recognized as one of the best of the many books on the Law of Compensation, and there are few men whose practical knowledge of the subject exceeds that of the learned author. It is a matter for regret, therefore, that more care has not been displayed in the preparation of this edition. Some of the small errors that appeared in the third edition, even one to which we called attention in our review of that edition, are repeated, and the new matter has not been very happily worked in. For instance, *In re Morgan & L. & N. W. Ry. Co.* [1896] 2 Q.B. 469, is, so far as we can ascertain, nowhere referred to. That case has always seemed to us difficult to reconcile with *Penny v. Penny*, and we should have welcomed some comments upon it from Mr. Cripps. Nor can we find any reference whatever to the provisions for compensation on taking land under ss. 9 and 10 of the Local Government Act, 1894. Several other cases of greater or less importance are insufficiently referred to, being simply added to lists of cases in notes without any attempt being made to incorporate in the text, or even in the notes, the new points decided by them. Such are *In re Spillers & Baker Lim.*, and *Leatham & Sons Arbitration, Gonty* (cited twice as *Gouty*) v. *M. S. & L. Ry. Co.* (upon question of costs in the Court of Appeal), *Miles v. G. W. Ry. Co.*, *Knowles v. Bolton Corporation*, and *L. & N. W. Ry. Co. v. Walker*. Arbitrations are frequently held in the country where access cannot readily be had to reports, and a mere reference to a case without any statement of its effect is in such circumstances of little use. The usefulness of the book has been added to by the inclusion in the appendix of several statutes 'to which the author has found it necessary in his practice to refer.' Beyond this we have not been able to discover any substantial differences between the present edition and its immediate predecessor.

The Law of Bailments. By EDWARD BEAL. With notes to Canadian cases by A. C. FORSTER BOULTON. London: Butterworth & Co.; Canada: The Carswell Co., Lim. 1900. lx and 775 pp. (27s. 6d.)

WE have often thought that there was room for a good book on the English Law of Bailments. It is somewhat surprising that since Sir W. Jones wrote his admirable essay in 1781, the last edition of which appeared in 1833, the subject has never received adequate treatment in a separate

treatise in this country. Practitioners have accordingly got into the way of using Story's Commentaries more freely than they do most American law books, but without in the least under-estimating the excellence of that work, we feel that Mr. Beal has done the profession a real service in producing a sound treatise on the English law. It is a novelty to find Canadian cases attached. To English lawyers they may sometimes be useful and they will no doubt add greatly to the value of the work in Canada. As they are all added in footnotes apart from the English cases and kept out of the text altogether, even the most insular of English lawyers has only to disregard them. The author seems to be much impressed with the danger of citing American decisions and has rigidly excluded them, quoting dicta of several judges as his justification. But he quotes freely, with due acknowledgment, from Story; and the decisions of leading American courts are at any rate as valuable as Story's opinions, except so far as those opinions may now be embodied in authoritative English judgments. As to the judicial dicta against citing American cases, as many might be produced the other way: in fact, they have been used by the House of Lords itself: see per Lord Herschell in *Mills v. Armstrong* (1888) 13 App. Ca. at p. 10. The truth is that judicious use is quite compatible with warnings against abuse.

Mr. Beal has given us a good book, dealing with every topic of his subject fully and exhaustively. But we cannot help thinking that it is not as good a book as the learned author is capable of writing. He suffers from want of self-confidence and his work in consequence suffers from having too little of the author and too much quotation. The author's method is peculiar. He first sets out his propositions of law concisely. Then instead of merely giving the authorities, or giving illustrations as Mr. Blake Odgers does in his book on Libel, Mr. Beal supports his proposition by very lengthy quotations from judgments or from works of authority. Now quotations from judgments without a succinct statement of the facts of the cases are generally useless and sometimes misleading.

Most of us can refer to the reports if we want to read the judgments at length, and the duty of a text-book writer is to give the result of the decisions and extract the principles rather than to re-print lengthy quotations which often add little or nothing to the author's summary. Thus four pages are filled with quotations from J. S. Mill, Lords Bramwell and Lindley, and other writers in support of the proposition *in jure omnis definitio periculosa est*. Then follow several pages of definitions of bailments, negligence, contract, piracy, &c., culled from divers sources, and every section of the book opens with a brave array of definitions. Though there are some four pages devoted to definitions of pledge, lien and mortgage, the author does not in our opinion anywhere make it clear, as he might do in a single sentence, what is the essential distinction between a pledge and a bill of sale.

The author accepts *Coupé Co. v. Maddick* ([1891] 2 Q. B. 413) without comment. It is a difficult case to reconcile with earlier decisions [see L. Q. R. viii. 109] and with the assumption made in *Clarridge v. South Staffordshire Tramways Co.* ([1892] 1 Q. B. 432). The view adopted is that 'there is a difference between the hirer's liability to the owner and his liability to a stranger injured by the negligence of a person who is not the hirer's servant. . . . In such a case the hirer is not responsible for the injury done to a stranger, which is a responsibility arising out of *tort*; but he is responsible to the owner for the injury done to the horse and trap by the negligence of the driver, which is a responsibility arising out of contract.'

This difference does not seem well founded in reason, and the author ignores what appears to be the only principle on which the judgment can be supported, viz. that the contract of hiring implies a warranty that reasonable care shall be taken of the thing hired by all persons having custody of it with his consent; whether acting in the course of their employment or agency, or not. Mr. Justice Cave went even further and said there was an implied obligation on the part of the hirer to return the thing hired in the condition in which he receives it, fair wear and tear and certain accidents excepted.

Mr. Beal seems scarcely to appreciate the importance of *R. v. Macdonald* (1885) 15 Q. B. D. 323. That case appears to amount to more than a mere decision on the Larceny Act, s. 3 that 'no contract express or implied need arise out of the bailment for a conviction under this section.' Surely it decides also that an infant may be a bailee? and it is not correct to say (see p. 10) that 'an infant cannot . . . be a party to a bailment except for necessities.' *Mills v. Graham* (1 Bos. & P. 140) may have decided the contrary, but has not that been overruled by *R. v. Macdonald*? If not, we should have welcomed the author's reasons for thinking otherwise.

The Principles of the Interpretation of Wills and Settlements. By ARTHUR UNDERHILL and J. ANDREW STRAHAN. London: Butterworth & Co. 1900. 8vo. xxxviii and 272 pp.

WE must congratulate Mr. Underhill and his coadjutor on this book. Mr. Underhill has written several books; all his books are good, and we observe a progressive improvement in his work; we do not exaggerate in calling the present book excellent. A sound knowledge of the theory of interpretation is essential to a lawyer; whether he practises at the Parliamentary Bar, as a common lawyer, an equity draftsman or a conveyancer, questions of interpretation constantly present themselves to him, but strangely enough there is no elementary treatise on the subject. The want is supplied by the book before us.

This book is divided into six parts, discussing (1) General principles, (2) Description of donees, (3) Description of property, (4) Interests transferred, (5) Conditions of gift, (6) Executory settlements; there is also a glossary of words most frequently occurring in wills and settlements.

The authors state in the preface that they 'have endeavoured to extract from the decisions some broad general principles which will assist the practitioner in the interpretation of ambiguous wills and settlements and to show the reasons which have led to the adoption of these principles; for without these reasons the soundness of the principles is not always immediately apparent.' A somewhat careful perusal of the book enables us to say that they have effectually carried out their intention.

It is somewhat difficult to select a passage for quotation out of so good a book, but the following is a fair example of its lucid and correct language:— 'When a general gift is made among the members of a class, the following rules apply:

'(1) If it be immediate, no person can be entitled *prima facie* to participate in it who was not a member of the class when the instrument of gift came into operation, provided there was any person then in existence belonging to the class.

'(2) If it be postponed, then any person becoming a member of the class after the instrument of gift came into operation, and before the period of distribution, may also be entitled to participate in the gift.

'(3) Where, in the latter case, the gift is of the *corpus* of property, and the postponement of the enjoyment is due to the conditions attached to the gift, then for the purpose of determining who can participate, the period of distribution will be the time when the conditions are so far performed as to entitle any member of the class to the enjoyment of his share of the gift.'

We may also call to the discussion of the 'Estates taken by Trustees' in Chapter V. We venture to predict a rapid sale for this book. We only hope that the authors will extend the scope of the next edition and discuss some questions which they have not treated of.

The Insolvency Law of Victoria. By W. H. LEWIS. Melbourne: Charles F. Maxwell; London: Sweet & Maxwell, Lim. 1899. La. 8vo. xlv and 834 pp. (£2 2s.)

IN many of the colonies there obtains an excellent practice of copying English Acts of Parliament, adopting them so far as the colonial legislatures think convenient, and for the rest adapting and modifying them to meet local needs. Thus in the matter of Bankruptcy legislation Victoria has generally kept pace with the mother country. Our Act of 1869 was followed by their Insolvency Statute, 1871, which also incorporated part of the Debtor's Act, 1869. In 1897 another Insolvency Act was passed which is largely based upon our Bankruptcy Acts, 1883 and 1890, and the Deeds of Arrangement Act, 1887. The rules also are similar to our own.

Thus Victorian lawyers get the benefit of many of the decisions of our Courts. The decisions of the Court of Appeal *in pari materia* are generally treated as authorities, and no doubt those of the House of Lords are regarded with almost if not quite as much reverence as those of the Privy Council. We conceive that it is of incalculable benefit to a colony, apart altogether from the general advantages arising from uniformity of law, to be able to utilize the numerous English cases for interpreting their legislation.

The author of this work has accordingly made free use of the English reports. But in glancing through the notes, we are somewhat surprised to find such a large number of Victorian cases. They indicate great activity on the part of the Court of Insolvency, greater than we should have expected in view of the size and prosperity of the colony.

Mr. Lewis has diligently collected the statutes, rules, and English and Victorian cases and has arranged them methodically. The text, however, is written in a somewhat loose and involved style, and the author seems scarcely to have considered some of the more difficult problems that may arise, such as the effect of the repeal of rule 87 of 1890 (see p. 237) which embodied the English law as to the distribution of partnership assets, and the question of conflict or overlapping of bankruptcy jurisdictions. The important Privy Council decision of *Callender, Sykes & Co. v. Col. Sec. of Lags* [1891] A.C. 460 is not discussed in the body of the work.

Studies in International Law. By ÉMILE STOCQUART, D.C.L., Avocat à la Cour d'Appel de Bruxelles. Bruxelles: Veuve Ferdinand Larcier. 1900. iv and 70 pp.

A too pretentious title conceals the true character and the real utility of Mr. Stocquart's pamphlet.

The title 'Studies in Private International Law' suggests a false idea of the book. A reader supposes that he will find in it either new ideas, such

for example as are Mr. Pillet's speculations, on the principles of private international law, or else the elaborate solution of some one or two of the very difficult problems which present themselves to any man who studies the conflict of laws. The reader, misled by an unfortunate title, will be disappointed to find that a writer so eminent as Mr. Stocquart supplies him with no new thoughts and does not attempt to solve any well-known difficulties.

The book has in reality more to do with comparative legislation than with the conflict of laws. It is a short and very clear summary of the laws as to marriage and divorce existing in different countries, with special reference to the conflict of laws which may arise from different legislation on the topics of marriage and divorce. When once the reader sees what the book really is he will acknowledge that it has a real though slight utility. An ordinary lawyer may well find it difficult to ascertain what is the law of France, of Italy, or of Spain respectively as to capacity to contract marriage. He will acquire information on this topic, though not very much, by consulting Mr. Stocquart's treatise. The information will be good as far as it goes, for Mr. Stocquart is a lawyer of large practical experience in all questions of private international law, and moreover has the gift of expressing himself clearly. The person who wishes to learn from him can always understand what Mr. Stocquart means, and may be assured that what Mr. Stocquart says is, as far as it goes, a fair statement of the law with which Mr. Stocquart professes to deal; and this is a good deal higher praise than can be given to the writers of most legal manuals.

Where to Find Your Law. By ERNEST ARTHUR JELF. Second Edition. London: Horace Cox. 1900. xxxvi and 547 pp. (10s. 6d.)

SELDOM does an author so accurately take the measure of his own work as does Mr. Jelf upon the title-page of his own book, which he there describes as 'a discursive bibliographical essay upon the various divisions and sub-divisions of the law of England and the statutes, reports of cases, and text-books containing such law, with appendices for facilitating reference to all statute [*sic*] and reports of cases, and with a full index.' Professing as it does to be discursive, it would be unfair to call attention, otherwise than by way of commendation, to the discursiveness of the work. We presume that in that characteristic the author includes all defects in arrangement, or, at least, unusual schemes of arrangement. It is novel and distinctly original to treat of lighthouses, of the Electric Lighting Acts and of the Gasworks Clauses Acts under the heading of 'the law relating to Light and Air.' Yet who can deny that these subjects are very pertinent to light and air, and that it is only a whim of lawyers to use the latter phrase exclusively in relation to easements and obstructions of light and air?

It is perhaps a little hard on the respectable family stockbroker that the law of the Stock Exchange should be regarded merely as a sub-division of 'the law relating to Speculation, Betting and Insurance'; and we should have expected the law of Markets and Fairs to find a place in 'the law relating to Brute Animals' as soon as in 'the law of Contracts.'

But all peculiarities in arrangement are amply compensated for by a very complete index, whose only weak point is that in several instances the subjects indexed are not followed by the enumeration of any pages or divisions of the book. This method of indexing leaves a good deal to the imagination, and does not facilitate reference.

The preparation of Mr. Jelf's book must have involved a most industrious

search among ancient and modern text-books and statutes, and the result appears to have been so far successful that a second edition has been called for within three years of the appearance of the first. 'Where to Find Your Law' combines the functions of a communicative and obliging librarian with those of a partial encyclopedia of case and statute-law, and we are informed that it is in great repute with students unfamiliar with the shelves of a law-library and the use of digests. But let not such students forget the author's warning (at p. 261) that 'the finding of the law is greatly facilitated by a knowledge of the principles upon which the law is based.'

Not the least pleasing parts of the treatise are the essays at the beginning of some of the chapters. They are adorned with many appropriate quotations from the Bible, Scott, Dickens and other authors, modern and classical. In them 'the law-finder' in search of light reading may find plenty of diversion from the weary pursuit of his calling. We can especially commend the author's reflections on the place of the brute animals in society and the discourse on the morality of betting.

We have also received :—

A Summary of the Law of Torts. By ARTHUR UNDERHILL. Seventh Edition. By the Author and HUBERT STUART MOORE. London: Butterworth & Co. 1900. 8vo. xxxvi and 382 pp. (10s. 6d.)—The utility of this book to students is well proved. We regret that the learned author has not on this or any former revision taken the opportunity to get rid of the obsolete and misleading use of the term 'implied malice' in the law of defamation, and we still more regret that he has gratuitously employed the same combination of words, in a quite different sense, in dealing with malicious prosecution. 'Implied' (in law) and 'inferred' (in fact) are not the same thing, and students should be taught as early as possible that they are not. On the other hand the 'express malice' required to rebut the defence of privilege is much more than Mr. Underhill states it to be, and slander of title, notwithstanding its name, is not a species of defamation at all, but a cause of action of another kind, analogous to deceit. These and some other matters were not generally understood when Mr. Underhill first wrote his book, and he has apparently not been able to keep pace with the modern development of judicial exposition. The recent case of *Lyons v. Wilkins* is made by a misprint in the defendant's name to appear in the text and the index as two distinct cases.

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vols. XLIII and XLIV. 1835-1838. London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1900. La. 8vo. Vol. XLIII, xvi and 905; Vol. XLIV, xv and 907 pp. (25s. each vol.)—Vol. XLIII deals with the first volumes of Moore's P. C. and Mylne & Craig's Chancery reports. It also includes 4 Adolphus & Ellis and 3 Bingham, N. C., with the contemporary volumes; 6 Nevile & Manning, 3 Scott and 3 Hodges. Among the important cases in the volume are *Young v. Bank of Bengal*, 1 Moo. P. C. 150; *Mayor of Lyons v. East India Co.*, 1 Moo. P. C. 175; *Roux v. Salvador*, 3 Bing. N. C. 266; *Vaughan v. Menlove*, 3 Bing. N. C. 468, and *Malachy v. Soper*, 3 Bing. N. C. 371.

Vol. XLIV contains 1 & 2 Keen, 5 Adolphus & Ellis, 4 Bingham, N. C., and the contemporary volumes; 1 Nevile & Perry and 4 & 5 Scott. *Wedderburn v. Wedderburn*, 2 Keen, 722; 4 My. & Cr. 41; and *Thomas v.*

Dering, 1 Keen, 729 are among the equity cases reprinted, and the long case of *Miller v. Knox*, 4 Bing. N. C. 574 (in the H. L.), and the frequently cited decision of *Line v. Stephenson*, 4 Bing. N. C. 678, will be found among the common law cases. In the Preface the Editor calls special attention to the fact that the Revised Reports are an edition and not a selection.

A Practical Guide for Sanitary Inspectors. By F. C. STOCKMAN. With an Introduction by HENRY KENWOOD, M.B. London: Butterworth & Co. 1900. 8vo. xv, 252 and 12 pp. (5s. net.)—This is not a law book, although it deals incidentally with the provisions of the various Acts regulating the sale of food, the inspection of factories, workshops and common lodging-houses, the testing of drains, the regulation of noxious trades, the prevention of infectious diseases, and questions of health and sanitation generally. It appears to include every subject likely to be of interest or value to the Sanitary Inspector or the Medical Officer of Health. Two chapters deal with nuisances under the various Public Health Acts and their remedies, one chapter with canal-boats and ships, and another with offensive trades. In the list of offensive trades is that of a fellmonger. We wonder how many people know what a fellmonger is.

Kelly's Draftsman: containing a collection of Concise Precedents and Forms in Conveyancing. Fourth Edition. By LEONARD H. WEST and WILLIAM AUSTIN. London: Butterworth & Co. 1900. 8vo. xlii, 582 and 29 pp. (15s.)—The attainment of two editions within a few months is an unusual distinction for a law book. Probably much of the success of 'Kelly's Draftsman' is due to the fact that so many useful forms are crowded into a small space. Under the heading of 'Miscellaneous Forms' about 100 pages of all sorts of out of the way precedents are given; and solicitors will hardly look in vain for any form of notice of which they may be in search among the hundred odd precedents given in the work. This edition shows a considerable increase in bulk, mainly due, the editors state, to the inclusion of forms under the Land Transfer Act, 1897, and Rules, 1898.

Penological and Preventive Principles. By WILLIAM TALLACK, Secretary to the Howard Association. Second Edition. London: Wertheimer, Lea & Co. 1896.—This book comes very late to hand. In any case it does not offer much opportunity for notice in a purely legal review. It is the work of the secretary of the Howard Association, not that of a lawyer. That the law by which prisons, penalties, and punishments in general are instituted may be improved, no lawyer will doubt. But since 1896, when this second edition of this work was published, many reforms have been enacted by the legislature. There are punishments by fines, by imprisonment, and by whipping, constantly, as we write, considered and debated in Parliament. There is the classification of prisons and of prisoners, to be carried doubtless much farther than it is at present; and great as the improvement has been in the nineteenth century, with its convict prisons, local jails, reformatories, industrial schools, and truant schools, for both sexes, perfection has as yet by no means been reached, either in the law or in the administration thereof. The Howard Association has done infinite good in the past, but this book wants to be posted up throughout, and it would be all the better for the excision of some unbusinesslike ornament. A writer who calls Carlyle 'a hasty and growling cynic' merely shows his incapacity to understand Carlyle, and an absence of that sense of humour which, we hope, is sometimes found even in prison reformers.

Appeal Cases under the Sale of Food and Drugs Acts, 1875 and 1879, and the Margarine Act, 1887. By B. SCOTT ELDER. London: Butterworth & Co. 1900. 8vo. xii, 78 and 10 pp. (3s. net.)—This little book contains notes on some eighty or ninety decisions on the above-named Acts. No comment is attempted, the author remarking that 'it is extremely undesirable, and indeed unsafe, to attempt to interpret any of the decisions, or to express any opinion thereon, as the decisions themselves are very often, apparently, contradictory to one another, and in direct conflict with the ordinary reading of the statutes.'

The Law relating to Electric Lighting and Energy. Second Edition. By JOHN SHIRESS WILL, Q.C. London: Butterworth & Co. 1900. La. 8vo. lxxxiv, 198 and 44 pp. (17s. 6d.)—In this edition the Electric Lighting Clauses Act, 1899, the new Board of Trade Rules relating to Applications for Provisional Orders, and the Report of Lord Cross's Committee on compulsory acquisition of land for generating stations, &c., have been embodied, recent cases noted up, and the work generally brought down to date.

The Transvaal War. A lecture delivered in the University of Cambridge on Nov. 9, 1899. By J. WESTLAKE, Q.C. London: C. J. Clay & Sons. 1899. 8vo. 35 pp. (1s.)—By an oversight we have omitted to notice this pamphlet in an earlier number. Mr. Westlake deals briefly with the early history of the English and Dutch in South Africa and the events leading up to the war.

The Yearly Digest of Reported Cases, 1899. Edited by EDWARD BEAL. London: Butterworth & Co. 1900. La. 8vo. lx pp. and 402 columns. (15s.)—This new Yearly Digest bears so much resemblance to Emden's Complete Annual Digest, which has ceased to appear for some years, that it might almost be described as a revival of it with improvements. The arrangement appears to be good, and a very full list of cases affirmed, reversed, overruled, &c., is given.

Journal of the Society of Comparative Legislation. Edited by JOHN MACDONELL, C.B., and EDWARD MANSON. New Series, 1900. No. I. London: John Murray. 1900. 8vo. 192 pp.—Among the many excellent articles in this number are 'The English Law of Nationality and Naturalisation,' by Mr. E. L. de Hart; 'Mahomedan Law in India,' by Sir Raymond West; 'Martial Law in Rebellion,' by Mr. G. G. Phillimore; 'The English Statute Book,' by Sir Courtenay Ilbert; and 'The Teaching of Law in France,' by Mr. Thomas Barclay. The number also contains a portrait of Chief Justice O. W. Holmes.

English Common Law in the Early American Colonies (a Thesis submitted for the Degree of Doctor of Philosophy, University of Wisconsin, 1898). By PAUL SAMUEL REINSCH. Madison, Wis. 1899. 8vo. 64 pp. (50 c.)—An interesting thesis, in which the most curious point is the evidence of a serious attempt on the part of the Puritan colonists to substitute the 'law of God,' i. e. the Mosaic Law, for the Common Law.

International Maritime Committee. London Conference, 1899, on the Law of Collisions at Sea, and Shipowners' Liability. Part I, Preliminary reports of the National Association and Committees. Part II, Proceedings of the Conference. Antwerp: J. E. Buschmann. vii and 208 pp.

Judicial Statistics, England and Wales, 1898. Part II, Civil Judicial Statistics. Statistics relating to the Judicial Committee of the Privy Council, the House of Lords, the Supreme Court of Judicature, County Courts and other Civil Courts. Edited by JOHN MACDONELL, C.B., a Master of the Supreme Court. London: printed for Her Majesty's Stationery Office, and to be purchased from Eyre & Spottiswoode. 1900. 221 pp. (2s. 1d.)

Commentaries on the Procedure of Civil Courts in British India, with special reference to the Code of Civil Procedure, being Act XIV. of 1882, with all subsequent Amendments. By HUKM CHAND. Vol. I. Bombay: Education Society's Press. 1899. La. 8vo. xiv, about 1,000 pp. (32s.)

The County Palatine of Durham: A Study in Constitutional History. By GAILLARD THOMAS LAPSLEY. Longmans, Green & Co., New York, London, and Bombay. 1900. 8vo. xi and 380 pp. (Vol. VIII of Harvard Historical Studies).—Review will follow.

A Guide to Criminal Law, intended for the use of students for the Bar Final, and for the Solicitors' Final Examinations. By CHARLES THWAITES. Fifth Edition. London: Geo. Barber. 1900. 8vo. xi and 162 pp. (7s. 6d.)

The Law of Animals. By JOHN H. INGHAM. Philadelphia: T. & J. W. Johnson & Co. London: Stevens & Haynes. 1900. La. 8vo. xiii and 300 pp.—Review will follow.

A Selection of Leading Cases in the Common Law. With Notes. By W. S. SHIRLEY. Sixth Edition by RICHARD WATSON. London: Stevens & Sons, Lim. 1900. 8vo. lix and 658 pp. (16s.)

Action at Law: being a concise Analysis of the Practice of the Courts. By JOSEPH A. SHEARWOOD. Second Edition. London: Geo. Barber. 1900. 8vo. xiii and 148 pp. (5s.)

A Treatise on the Law relating to the Carriage of Goods by Sea. By T. G. CARVER, Q.C. Third Edition. London: Stevens & Sons, Lim. 1900. La. 8vo. lxxi and 923 pp. (36s.)

A Concise Introduction to Conveyancing. By J. ANDREW STRAHAN. With a chapter on Registration of Title, by William Blyth. London: Butterworth & Co. 1900. 8vo. xix, 290 and 16 pp. (10s. 6d.)

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NOTES.

LAWYERS must speak with some degree of respect of a contention which was upheld, though not unanimously, by the Court of Appeal, and found favour with one law lord. But plain men will think that the House of Lords, in *Powell v. Main Colliery Co.* [1900] A. C. 366, 69 L. J. Q. B. 758, did a good deed by construing the Workmen's Compensation Act in accordance with its general beneficent intention and common sense. The 'claim for compensation' which must be made within six months of the accident in order to obtain the benefit of the Act need not be a claim by a judicial proceeding in the county court. A notice of claim addressed to the employer is sufficient. It will be observed that Lord Justice Romer's dissenting judgment in the Court of Appeal, being fully adopted by Lord Davey in the House of Lords, now acquires the highest rank of authority. We have more than once called attention to the amount of litigation raised by this Act, of which some at least might have been avoided by better workmanship. It is only fair to add that the general success of the Act must be measured by the number not of disputed cases, but of those—naturally unknown to readers of law reports—which are settled in a summary manner, or without any dispute at all.

It was easy to foretell (see L. Q. R., p. 104 *ante*) that *De Nicols v. Curlier* [1900] A. C. 21, 69 L. J. Ch. 109, would sooner or later raise the question how far a French marriage between French citizens domiciled in France affects the rights of the parties in regard to English land.

This prediction has been verified by *In re De Nicols* [1900] 2 Ch. 410. The judgment of Kekewich J. in that case in effect determines, as far as the matter can be decided by a Court of first

instance, that where *H* and *W*, French subjects domiciled in France, have married subject to the *régime de la communauté*, though without otherwise making any express marriage contract, there exists in effect a special marriage contract defined by reference to the French code, and that this contract has the same binding effect as an express contract, and is enforceable against real and leasehold property in England; and the judgment of Kekewich J. is apparently a fair application of the principle laid down by the House of Lords in *De Nicols v. Curlier*, though their lordships in the particular case applied it only to movable property.

To the student of the rules maintained by English Courts with regard to the conflict of laws, the two cases, *De Nicols v. Curlier* [1900] A. C. 21, and *In re De Nicols* [1900] 2 Ch. 410, 69 L. J. Ch. 680, have the greatest importance and suggest two observations.

(1) The decision of the House of Lords, as interpreted by Mr. Justice Kekewich, does in substance, though not in form, make a serious inroad upon the principle maintained by English tribunals, and unhesitatingly accepted by American and English authorities, that all rights, interests, and titles in and to immovable property are exclusively governed by the *lex situs* (see Story, Conflict of Laws, s. 424; Westlake, Private International Law, 3rd ed., p. 189; Dicey, Conflict of Laws, p. 516). It is clear that where French citizens marry in France in the ordinary way the rights of husband and wife in regard to English land are governed in effect not by the law of England (*lex situs*) but by the law of France. And be it noted that the principle of *De Nicols v. Curlier* clearly applies to a marriage governed by the law of any country where the Code Napoléon, or any modification of the Code Napoléon, or indeed where any Code governing the property rights of the parties to a marriage exists.

(2) Our Courts will be ultimately compelled by the force of logic to adopt the doctrine advocated by Savigny, Bar, and on the whole by the best continental authorities, that the law of the country to which a husband and wife are subject at the time of their marriage (which law, according to English views, is in general the *lex domicilii* of the husband) regulates their property rights during the whole of their married life; and that in this matter no distinction should be drawn between immovable and movable property.

The rule of the *lex situs* is formally intact for this reason: the foreign 'statutory settlement' implied in the *régime de la communauté* does not operate by way of creating any estate, even equitable, in English land, but as an executory contract for the disposal of the

land in question; a contract which it is, and always was, open to the parties to make anywhere and in their own way, so long as it does not stipulate for the creation of estates or interests unknown to English law.

We have constantly insisted in this REVIEW upon two considerations often overlooked by students of private international law. The one is that this branch of law has been developed in England almost entirely by the process of judicial legislation. The other is that our judges have exhibited extraordinary legislative activity in this department during the last half century, and have thus filled up one by one a number of gaps in our system for determining the conflict of laws.

Each of these observations is illustrated by the recent case of *Viditz v. O'Hagan* [1900] 2 Ch. 87, 69 L. J. Ch. 507, C. A.

It has long been a speculative question to which no precise answer has hitherto been supplied by English decisions, how far a person, on passing under the dominion of a new personal law, is affected by incapacities imposed thereby.

This question was raised in a curious shape in *Viditz v. O'Hagan*, of which the facts may for our present purpose be thus broadly stated.

W is an Englishwoman domiciled in England, and an infant. She marries an Austrian citizen domiciled in Austria. The marriage takes place at the British Legation in Switzerland, and must admittedly be treated as if it were a marriage celebrated in England. *W* executes, immediately before her marriage, a marriage settlement under which all her after-acquired personal property is settled upon herself and her husband for life, and then upon the issue of the marriage. Such a settlement is, under Austrian law, void, or at any rate can be avoided at any time by the husband and wife. *W*, by her marriage, becomes an Austrian subject domiciled in Austria. Long after *W* has become of age she executes a deed meant to carry out the terms of the settlement. Some years later *W* and her husband execute in Austria a notarial document intended to revoke the marriage settlement and the subsequent deed, and this notarial document does, under Austrian law, avoid the settlement and the deed. Money devolves upon *W*; it is in the hands of the trustees of the settlement. Is it bound by the terms of the settlement, or is the settlement void? There is no doubt that, if *W* had continued subject to English law, the settlement which she did not repudiate till long after she came of age, though originally voidable by her, must have been treated as ratified (*Cooper v. Cooper*, 13 App. Cas. 88; *Edwards v. Carter* [1893] A. C.

360. If, on the other hand, the validity of the settlement depends upon Austrian law, it must clearly be held invalid. The Court of Appeal, reversing the judgment of the Court below, have held that *W* on her marriage became subject, as regards her personal capacity, to the law of her Austrian domicile, whence the result follows that a contract which was voidable under the law of England, and was void under the law of Austria, could not at any time become valid. The conclusion appears to be sound and to be really a fair deduction from the general principle that contractual capacity depends upon the law of a person's domicile. It is, however, undoubtedly the case that in drawing what appears to be a sound logical deduction from admitted principles, the Court of Appeal have filled up a gap in the rules of private international law as maintained by English Courts.

In re Martin [1900] P. 211, 69 L. J. P. 75, C. A. raises several knotty questions of private international law. It decides however one point only, namely, that if *W*, a Frenchwoman domiciled in France, makes a will of movables and afterwards marries *H*, who at the time of the marriage, as well as at the time of *W*'s death, is, though a French citizen, domiciled in England, then the marriage is a revocation of *W*'s will, and if she executes no other *W* dies, according to English law, intestate.

The Court of Appeal held (though Lindley M.R. dissented) that *H* was at the time of his marriage with *W*, as also at her death, domiciled in England. But even on this view of the fact the judgment of the Court is open to criticism. It is strange that neither counsel nor judges called attention to Lord Kingsdown's Act, 24 & 25 Vict. c. 114, s. 3, which provides that 'no will or other testamentary instrument shall be held to be revoked or to have become invalid . . . by reason of any subsequent change of domicile of the person making the same.' Now it is admitted that if *W*, who when she made her will was domiciled in France, had retained her French domicile until her death, her will would not have been revoked. But if so it is at least arguable that, in virtue of Lord Kingsdown's Act, a change of domicile, even though caused by marriage, cannot have worked a revocation of *W*'s will. One is the more surprised that this point, whatever its worth, was not taken, since as early as 1866 Sir J. P. Wilde called attention to the possible effect of 24 & 25 Vict. c. 114, s. 3 on the revocation of a will by marriage (see *In Goods of Reid* (1866), L. R. 1 P. & D. 74, 76).

Should *In re Martin* be taken to the House of Lords, it is more than possible that their lordships may agree with the President of the Probate Division and with Lindley M.R. in holding that the

husband retained his French domicil. Should they take this view of the facts, they will hardly dissent from the masterly exposition of the law by the ex-Master of the Rolls.

H.M.S. *Sans Pareil* [1900] P. 267, C. A. is disappointing. It narrowly escaped being a leading case upon more than one difficult point of general, statutory, and admiralty law; but the net result of four lengthy judgments, delivered after consultation with four nautical assessors, is no more than this,—the *Sans Pareil* did not see, as she ought to have seen, the *East Lothian* in time to avoid her. Upon the one question of general interest expected to be raised and decided by the case, no decision was arrived at, because it was not raised by the facts. That question, a very practical and a very important one, is, Whether a single steamship (or, as here, a ship in tow of a tug) crossing a fleet of warships in close formation must, under Article 27 of the Regulations for preventing collisions at sea, keep out of the way of the fleet, or whether the fleet must, under Article 19, keep out of the way of the ship? Unfortunately the three judges of the Court of Appeal, A. L. Smith, Vaughan Williams, and Romer L.JJ., agreeing with their nautical advisers, answered this question *obiter* in favour of the fleet, whilst Barnes J. and the Trinity Brethren answered it in favour of the single ship. Had there only been a decision upon the point, the seaman who has to apply the Regulations, or at least the lawyer who has to advise the shipowner after a collision, might have learnt something by the case. As it is three judges and two assessors advise the navigator that the law requires him to keep clear of the fleet, whilst one judge and two assessors advise the contrary. What is the unfortunate man to do? Since experts disagree, and Romer L.J. has set the example, we are tempted to express the opinion that it is neither prudent nor seamanlike for a tug with 200 yards of tow line and a tow astern of her, to attempt to thread her way through four lines of heavy ships going ten knots in close formation. If there were no rule of the road at sea, and no Articles 19 and 21 on the statute-book, there could scarcely be a question upon the matter; and (*pace* Barnes J. and the Trinity Brethren) we cannot think that the Regulations are so perverse as to require the seaman to cause what seems to us an entirely unnecessary risk both to himself and to the ships of the fleet. We strongly advise him to read and digest the strongly worded and very practical judgment of Romer L.J.

The other important points of general and statute law which were discussed in the case can only be noticed here. No decision

was arrived at upon any one, though strong opinions were expressed upon some of them. If the officer in charge of the *Sans Pareil* had seen the tug in time, would the initial fault of the tug in attempting to cross the fleet (if fault it was) have been a proximate cause of the loss? Can one of Her Majesty's ships be 'deemed to be in fault' under s. 419 of the M. S. Act 1894? Can any ship be 'deemed to be in fault' for not observing Article 27? Can a merchant ship be 'deemed to be in fault' where the other ship is a Queen's ship, and as such is not subject to the statutory Regulations? No authoritative answers to these questions will be found in H.M.S. *Sans Pareil*, and in view of the diversity of judicial opinion expressed small assistance towards answering them may be gleaned from the case.

The judgments in *Rice v. Noakes* ([1900] 2 Ch. 445, 69 L. J. Ch. 643, C. A.), elaborate as they are, still leave us with a feeling that the mystery of the tied house and the doctrine of clogging the equity of redemption, and the relation of these to one another, are not satisfactorily cleared up. The doctrine of clogging, we are told, remains as unimpaired as ever, and no doubt this is so. What has changed under the influence of modern life and modern business methods is, not the doctrine of equity, but the mortgage contract. In old days the Court allowed the mortgagee to claim nothing but his principal and interest. In these days it allows mortgagor and mortgagee to make what bargain they like, provided it is not oppressive on the mortgagor. The mortgagee may stipulate, for instance, that he shall not be paid off for, say, seven years; or, if the property mortgaged is a theatre—a precarious form of security—the mortgagee may stipulate that he shall be paid in a share of the profits; if the security is a public house, the mortgagee may stipulate for a tie—a covenant by the mortgagor to take all his beer from the mortgagee. This freedom of contract is advantageous—as Courts in modern times have recognized—to both parties. The mortgagor is able to borrow more easily and on better terms; the mortgagee gets his consideration in the form which suits him best: but it is misleading to treat the transaction in these cases as a mortgage plus a collateral stipulation. It is one entire bargain for the loan of money on security, and before the Court can apply the doctrine of clogging the equity of redemption, it must first find out what the bargain between the parties was; for what does it mean, this equity of redemption? It means the mortgagor's right to have his security back on fulfilment by him of the terms of the bargain, not restricted, as in old days, by the Courts—under the apprehension of oppressiveness—to principal and interest only, but inter-

preted in the light of the modern cases which have sanctioned a much greater latitude and diversity of terms where mortgagor and mortgagee are contracting, terms corresponding to changes in business methods. Whatever these terms are, so long as they remain unfulfilled there is no present right to redeem, and therefore there can be no clogging of the equity in any proper sense. The fact of the mortgagor being by the terms of the mortgage deed reinstated in possession of the mortgaged premises before completion of the whole bargain, need not make a continuing term of the bargain—like a tie—a clog.

N, a rate collector, fraudulently obtains a cheque for £142 from *A*; it is drawn to his order upon a London bank, crossed generally, and marked 'not negotiable.' *N* endorses the cheque and cashes it at the bank of *X & Co.* where he has no account, but where he habitually cashes cheques. The proceeds are partly applied by *X & Co.* in accordance with *N*'s directions. The balance is handed to him in cash. *X & Co.*, in good faith and without negligence, receive payment of the cheque from the London bank on which it is drawn. *A* afterwards discovers the fraud of *N*, and demands from *X & Co.* the return of the money, which is refused. It is held by the Court of Appeal (*G.W.R. Co. v. London and County Banking Co.* [1900] 2 Q. B. 464, 69 L. J. Q. B. 741), *dubitante* Vaughan Williams L.J., that, though the cheque is marked 'not negotiable,' *X & Co.* have, under the circumstances, a right to retain the money received by them from the London bank in payment of the cheque.

The judgment of the Court of Appeal may, in spite of the doubt expressed by Vaughan Williams L.J., be good law, but it must be unsatisfactory to the ordinary public. It gives an excessively wide meaning to the word 'customer' (see *Matthews v. Brown & Co.*, 63 L. J. Q. B. 494, and *Lacave & Co. v. Crédit Lyonnais* [1897] 1 Q. B. 148), and through this wide interpretation so extends the protection given to bankers by the Bills of Exchange Act, 1882, s. 82, as almost to nullify the salutary provision of s. 81, under which a person who takes a crossed cheque which bears on it the words 'not negotiable,' does not obtain a better title to the cheque than that which the person from whom he took it had. If the Court of Appeal is right, any rogue who is accustomed to cash cheques at a bank may defeat the protection meant to be given to any one who had the prudence to mark a cheque with the words 'not negotiable.' The decision affords a fresh reason for preferring the form of crossing 'account payee,' which is now common.

It was a neatly constructed argument which counsel presented to the Court of Appeal in *In re Dixon*, 69 L. J. Ch. 609, but it overlooked a point of old learning—the distinction between a bond with a penalty and a bond without a penalty—and it consequently tumbled down like a house of cards. The distinction is not a pure technicality; the penalty annexed means, as Equity in relieving against it has long read it, that the obligee is to have his principal and interest, not merely damages as in a simple bond. This became very material in *In re Dixon* (69 L. J. Ch. 609), where a husband had borrowed money of his wife and given her a bond conditionally in a penalty for repayment, and the bond had lain for twenty years among the husband's papers unredeemed; for on the above principle it still remained an interest-bearing security. Still there was the fact that no interest had been paid to the wife, and the husband's executors took advantage of it to set up the Statute of Limitations. Fortunately our judges are men of the world as well as good lawyers. They know that husbands and wives living together in amity do not keep debtor and creditor accounts against one another—often indeed have a common purse—and the Court of Appeal, in this instance, were not going to spoil such conjugal confidence and sow distrust in its stead. A judge's function, according to the late Lord Esher, is to give a good legal reason for the conclusions of common sense, and the Court had plenty of them ready in the husband's trusteeship, and the hand to pay and to receive being the same.

We doubt whether Parliament, when it passed the Public Authorities Protection Act, 1893, really contemplated the special protection of such defendants as the statutory governing body of a hospital sued for damage caused by the negligence of a nurse employed in the hospital: *Markey v. Tolworth, &c., Hospital District Board* [1900] 2 Q. B. 454, 69 L. J. Q. B. 738, where the only question argued and decided was on the date at which the damage accrued and from which, therefore, the six months' limitation ran. Hospital boards are not very like the justices, sheriffs, or constables who were protected by earlier partial enactments in the execution of duties, an execution necessarily productive of damage to some one, and sometimes, by misadventure, to the wrong persons, or otherwise unjustifiably. But the words of the Act are clearly sufficient to cover such cases, and it is not for the Courts to limit the charity of the Legislature on mere speculation. The actual decision is that in an action under the Fatal Accidents (commonly called Lord Campbell's) Act the cause of action accrues at the death of the deceased person,

and not at some later time or times to be fixed in some way by reference to the pecuniary loss suffered at one time, or from time to time, by the plaintiffs. This seems correct, if only on the ground of obvious convenience.

No government will, under the conditions of modern Parliamentary legislation, undertake to consolidate and amend the Income Tax Acts, but a minister endowed with Quixotic public spirit could render no greater service to the public than to revise and re-enact the whole income-tax law, which as it stands is at once antiquated, complicated, and obscure. Hardly a month passes without cases being reported which, considering that the tax has been in force for nearly sixty years, ought not to require decision.

Such a case is *Beaumont v. Bowers* [1900] 2 Q. B. 204, 69 L. J. Q. B. 600. T, a clerk to the guardians of a union, is, under the Poor Law Officers' Superannuation Act, 1896, compelled to contribute £15 of his annual salary to a superannuation fund. He claims under the Income Tax Act, 1842, s. 146, to deduct this sum from the amount at which he is assessed to income tax as a 'sum chargeable on his salary by virtue of an Act of Parliament.' The claim, though resisted by the Crown, was held to be valid by the Q. B. D. In this case the ambiguities of the Income Tax Acts made doubtful the right to an exemption which Parliament certainly meant to grant.

Armitage v. Moore [1900] 2 Q. B. 363, 69 L. J. Q. B. 614, simply decides, though under rather complicated circumstances, that income tax under Schedule D is payable by a trustee on profits made by him in carrying on a business on behalf of the creditors of an insolvent firm. Here the claim of the Crown would appear to be clear. All that can be said against it is that the uncertainty of our income-tax law suggests or justifies resistance to the demands of the Inland Revenue whenever novel circumstances make it possible plausibly to question the application of even the best-established principle of revenue law.

The Gracchi complaining of sedition, or the pot calling the kettle black, are but mild illustrations of that sense of incongruity, or worse, which we feel in one spouse, not himself or herself blameless, exacting the penalty of infidelity or of any other matrimonial offence against the other; when, for instance, a husband, guilty of cruelty, seeks to put away his wife for adultery. He may technically have the law on his side, but for him to invoke it accords but

ill with that reciprocity of matrimonial obligation which is of the essence of the union. This problem of matrimonial ethics, which is constantly recurring, is one of far too great nicety to be met by any hard and fast rule of law; it can only be solved by judicial discretion; it was so dealt with in the old Ecclesiastical Court; and the Matrimonial Causes Act of 1857 has but perpetuated that discretion. It has perpetuated also, it would seem (*Pryor v. Pryor* [1900] P. 157, 69 L. J. P. 99), the principles upon which the old discretion was exercised, and one of those principles was that where a husband himself guilty of cruelty sought a divorce on the ground of his wife's adultery, the cruelty was not a bar to his claim unless it conduced to the adultery. Here is scope for a volume of casuistry. But after all it profits little—this nice balancing of conjugal equities or iniquities against one another. The important thing practically is the situation brought about by the Court refusing relief—the matrimonial deadlock. 'Deplorable' is the word used by the President to describe it. The husband is tied to a woman who has been found guilty of adultery and with whom he cannot be expected to live; the position of the wife is worse. She cannot compel her husband to maintain her or pledge his credit for necessities; she cannot claim restitution of conjugal rights with the object of obtaining support from him, nor can she avail herself of the Summary Jurisdiction (Married Women) Act, 1895. In a word, the situation is a satire on marriage, and unfortunately it is one which is constantly repeating itself, not only in cases of the common guilt of the spouses, but in judicial separations. These judicial separations, especially those pronounced by magistrates under the summary jurisdiction, are, as Mr. John Macdonell's judicial statistics show us, becoming increasingly common, and, looking at the relations they create, represent a serious social danger.

Subtle and interesting are the questions of morality or casuistry raised by the rules as to fraudulent preference. *A*, when on the verge of bankruptcy, borrows £1,000 from *X*. He obtains the loan by the representation that it will enable him to pay off the whole of his existing liabilities, and under an implied agreement that the money lent shall be employed to pay his debts. *A* forthwith spends it for a different purpose, and absconds, thereby committing an act of bankruptcy. On the evening of the same day he posts a letter to *X* containing two bank notes of £500 each. Is this a fraudulent preference? Mr. Justice Wright in *In re Vautin* [1900] 2 Q. B. 325, 69 L. J. Q. B. 703, says it is not, and every one must be glad that

his lordship was able to arrive at a decision which satisfies ordinary moral sentiment. It is certain that *A* meant to repair a grievous wrong, and that he felt, as most men would feel, that it was a particularly base act of dishonesty to extort money from the kindness of a friend and then defraud him. To put the same thing in other words, *A* preferred, and, as many moralists will say, rightly preferred, that *X* should be repaid in full, and that what had been *X*'s money should not be equally divided among *A*'s creditors. But this very mode of putting the thing leaves a doubt whether *X* was not guilty from a legal point of view of fraudulent preference. The principle to be deduced from *In re Vautin* is well expressed in the head-note as follows: 'When a debtor, with bankruptcy impending, pays a creditor in the honest belief on reasonable grounds that he is legally bound to make the payment, it is not a fraudulent preference, even though the debtor is in fact under no legal obligation to make the payment.' Can this be good law? *A* is under a legal obligation to pay all his creditors, *X*, *Y*, and *Z*. He reasonably therefore supposes that he is under a legal obligation to pay *X* in full. He is from particular circumstances specially alive to the moral force of *X*'s claim. He prefers to pay *X*, and does so. May not this be, in law, a fraudulent preference of *X* to *Y* and *Z*? The right answer to this apparently puzzling question seems to be that the money was never *A*'s money unconditionally. Being advanced for a special purpose only, it did not become part of his general assets.

The policy of the Preferential Payments Acts in paying clerks and servants of an insolvent to a limited amount in priority to general creditors, and now even to debenture-holders, is a very considerate as well as just one. It is not merely that the hardship inflicted on these small creditors by bankruptcy or winding-up is greater than on claimants for a larger amount, but that their labour has to some extent helped to create or preserve the assets. But who is a 'servant'? Is a manager a servant? Yes. Is a managing director a servant? No. (*In re Newspaper Syndicate* [1900] 2 Ch. 349, 69 L. J. Ch. 578.) A managing director, according to Cozens-Hardy J. in that case, is just an ordinary director entrusted with some special powers, and the fact that he is paid a salary does not alter his position. A managing director is in fact a *Janus bifrons* uniting in himself two characters, that of general agent to the company and manager to the directors, but the directorial element predominates and determines his status. But in truth the managing director does not need to trust to the benevolence of the section. He, if any one, knows how the company's

affairs are going, and, if there is to be shipwreck, takes care to get hold of a life-preserver.

'*Tua res agitur paries cum proximus ardet*'; that is, you may get an injunction if the tenant of the flat under you sets up a restaurant kitchen range (*Sanders-Clark v. Grosvenor Mansions Co.* [1900] 2 Ch. 373, 69 L. J. Ch. 579). In *Reinhardt v. Mentasti* (42 Ch. D. 685, 58 L. J. Ch. 787) Kekewich J. decided a similar point in favour of a gentleman whose wine was overheated by the flue. There is something epicurean in the idea of stopping your neighbour from cooking in order that your wine cellar may be kept cool; some indeed might darkly hint that a wine cellar was hardly the subject of a legal grievance, as more allied, in Lord Justice Knight Bruce's language, to 'elegant and dainty modes and habits of living,' than 'plain and sober and simple notions among English people'; but, wine cellars apart, a flaming *Ætna* from a restaurant cooking range below is a source of reasonable uneasiness as well as of discomfort. There are always two sides to these injunction cases, however, as Lord Selborne remarked; the restaurant keeper may after all only be making a reasonable use of his premises, and if he is, he is not to be stopped. So Buckley J., following Lord Selborne, thinks, notwithstanding some *obiter dicta* to the contrary by Kekewich J. The difficulty is to say what is and what is not a reasonable user. Children's noises, the eternal scales of the schoolroom piano, dancing overhead and flirting on the stairs (*Jenkins v. Jackson*, 40 Ch. D. 71, 58 L. J. Ch. 124), these are the sort of things which the citizen of average firmness of mind must contemplate as possibilities of neighbourhood and domesticity, and put up with accordingly; but it is another matter when the ground floor of a house, say in Green Street, is turned into a stable (*Ball v. Ray*, L. R. 8 Ch. 467), or a residential flat into a club (*Hudson v. Cripps* [1896] 1 Ch. 265, 65 L. J. Ch. 328), or into a restaurant with a fiery flue. These are a perverting of the premises from their original design and natural user, which a neighbouring tenant cannot be expected to reckon with or endure.

T, a Frenchwoman domiciled in France, executes a will in a form which is valid according to French law. The will is intended to be made in execution of a power of appointment under an instrument which requires the power to be executed with special formalities. The will does not comply with these formalities. It is not, as the provisions of the Wills Act, 1837, ss. 9 and 10, do not apply, a good execution of the power of appointment.

This is all that is decided by *Barretto v. Young* [1900] 2 Ch. 339, 69 L. J. Ch. 605. The oddity of the thing is that the point decided should have been thought doubtful. The principle would appear to be perfectly clear that, except in cases where the Wills Act, 1837, applies, a will made in exercise of a power of appointment must comply with the terms of the power. The truth appears to be that *in re Kirwan's Trusts*, 25 Ch. D. 373, has been misunderstood, and *Hummel v. Hummel* [1898] 1 Ch. 642, 67 L. J. Ch. 363, is either wrongly decided or unexplainable, and that these two cases have introduced confusion into the law as to the exercise of powers of appointment by will.

Whoever is interested in the development of the law will do well to note such a case as *Bennett v. Harding* [1900] 2 Q. B. 397, 69 L. J. Q. B. 701. All that the case decides is that a stable yard and stables at which a large number of cabmen are in daily attendance for the purpose of hiring cabs is a workplace within the meaning of the Public Health (London) Act, 1891, s. 38, and therefore must be provided with suitable accommodation in the way of sanitary conveniences. The judgment of the Court is likely enough to be right, though we suspect that some years ago judges would have been inclined to hold that the generality of the word 'workplace' was to a certain extent cut down by the preceding words 'factory' and 'workshop.' Grant however that the decision is right, the terms 'factory,' 'workshop,' and 'workplace' each mark a stage in the advance of State interference with the conduct of private business, and *Bennett v. Harding* itself proves that the courts are no longer inclined, as they certainly were some fifty years ago, to limit rather than extend Parliamentary inroads upon the principle of *laissez faire* (to which the Common Law has never committed itself, whatever the policy of legislation might be). Compare with *Bennett v. Harding* the *Savoy Hotel Co. v. London County Council* [1900] 1 Q. B. 665, 69 L. J. Q. B. 274, on which we commented in our last number.

It is really as difficult to feel any sympathy with the grievances of the floating debenture-holder as with the disappointed howls of the Virgilian wolf trotting round the sheepfolds while the timid sheep—otherwise the anxious, unsecured creditors—are bleating within. French law will have nothing to do with the floating security as we understand it, regarding—not unnaturally—such a charge as a fraud on the general creditors of a company; for what is the position of debenture-holders with a floating charge? They allow the company to go on trading—contracting obliga-

tions—as if there were no charge subsisting. But no sooner does the general creditor seek to enforce his rights than the debenture-holders start up like Roderick Dhu's warriors, armed for strife, and intercept his lawful execution. Debenture-holders, however, cannot have it both ways, the advantage of a floating charge over all the assets, present and future, and at the same time the right to object to the company dealing with the property in the way it thinks best, which was what they wanted to do in *In re Vivian & Co.*, 69 L. J. Ch. 659. The company there carried on business at three different centres. Two of the businesses proved profitable, the other did not, and the company proposed to get rid of it, but the debenture-holders said, 'No; this is part of our security, and the transaction is not one in the "ordinary course of business."' If the company had been trying to sell the whole of its undertaking, the debenture-holders might have been right (*Hubbuck v. Helms*, 56 L. T. 232); but it is quite different where it is only a portion of the undertaking, and where the interests of the company require the directors to part with it. The debenture-holders, by taking such a form of security, have elected in substance to subordinate their rights to the directors' discretion in carrying on the business, and they must accept the consequences of the bargain.

We have no special law in England for the prodigal who has passed infancy without reaching years of discretion. Mr. Hagberg Wright thinks it a pity we have not (L. Q. R. xvi. 57), but in the meantime it would be unfortunate if the law were to discourage attempts by the extravagant to save them from themselves and put their property beyond the reach of temptation. Such was the settlement made in *In re Lane Fox* [1900] 2 Q. B. 508, 69 L. J. Q. B. 722. The young lady there was possessed of a fortune, and with laudable discretion she settled it on herself in the names of trustees, paying off all her existing creditors. Then, made too secure perhaps by the virtue of her act of renunciation, she yielded to feminine extravagance and ended in bankruptcy: for there is no assurance, as prudent friends fondly imagine, that, because a person has nothing to pay with, he or she will not incur debts. The settlement in *In re Lane Fox* could not be challenged under s. 47 of the Bankruptcy Act, 1883—though the trustee tried that course at first—because the settlor was solvent at the time she made it, so the only thing to be done was to try and impeach it under 13 Eliz. c. 5, as made to defeat and delay creditors: but here again was a stumbling-block in the way of the trustee: it was impossible to impugn the honesty of the settlor. The nearest

analogy is in that class of cases where a person solvent at the time contemplates engaging in some hazardous business, and before doing so settles property in order to put it out of the reach of his prospective creditors (*Stileman v. Ashdown*, 2 Atk. 481), but in such a case the design is plainly fraudulent. A settlement is not fraudulent, it must be borne in mind, because it defeats creditors. Every settlement puts property out of the reach of creditors. That is the very object of it.

Lord Russell of Killowen was not one of those judges whose wealth of learning passes into the substance of the law, leaving it enriched for all time to come. His faculties were great, but different from those of a Willes, a Blackburn, a Westbury, or a Cairns. And yet his premature death is a grave loss, not only to the strength and dignity of justice, but to the science of law. For the late Chief Justice had two qualities which are even more important in judicial high places than technical learning. Like all really great advocates, he seized on the vital points in complex bodies of fact with swift and sure apprehension; and when he was dealing with interests larger than those of individual clients, this power was at the service of a wide and liberal vision. His address to the American Bar Association, published in these pages (L. Q. R. xii. 311), is a worthy exposition of the traditional and sound conception of the law of nations as against the lamentably narrow views to which some English statesmen and judges have committed themselves in recent times. Here, too, we are specially bound to remember that he was foremost among the minority of persons in authority who have striven, in the face of professional prejudice and public apathy, to establish an efficient system of training for English lawyers. Sooner or later this will be done, but without Lord Russell of Killowen's masculine sense and untiring eloquence we sorrowfully confess that for the present the prospect seems more distant.

At the annual meeting of the American Bar Association, held at Saratoga Springs, New York, August 31, 1900, Professor James Bradley Thayer, of Massachusetts, moved the adoption of the following minute:

'The American Bar Association has heard with peculiar sorrow of the death of Lord Russell of Killowen, Lord Chief Justice of England, and desires to enter upon its records some permanent expression of honour and esteem for his memory.

The members of this Association had followed and known well

that brilliant career which made Sir Charles Russell the conspicuous and admired leader of the English Bar, and they had rejoiced at the elevation of one so competent to the great office which he held with such distinction at the time of his death. Four years ago we welcomed him here as our chief guest. Recalling now the noble address which he delivered to us on the 30th of August, 1896, and the deep-felt enthusiasm inspired in the hearts of all who listened to him, the members of this Association desire to express their admiration for the manner in which he has filled his high office, their grateful recollection of his visit here, their affectionate regard for his memory, and their respectful sympathy with the Bench and Bar of England in so great a loss to our common profession.'

The minute was duly seconded and was unanimously adopted by a rising vote.

Mr. Francis Rawle, of Philadelphia, moved the adoption of the following minute:

'On July 27, a banquet was given in London in the ancient hall of the Middle Temple by the Bench and Bar of England to their brethren of the Bench and Bar of the United States. The American Bar Association desires to place upon its record its hearty acknowledgement of this fraternal act and a cordial reciprocation of the sentiments which prompted it.'

The minute was duly seconded and was unanimously adopted.

The public who watched with interest the controversy carried on between Sir Edward Fry and the solicitors and others who have attempted to defend the taking by agents of secret commissions in respect of work done on behalf of their principals, should bear in mind two facts.

1. All money received by an agent, when contracting for a principal without the knowledge of his principal, from the other party to the contract, is the money of the principal, and may be recovered by him, not only in a Court of Equity, but also in any Common Law Court.

2. The illegality, no less than the immorality, of the receipt of a commission by an agent depends wholly upon its secrecy. Any agent, whether he be a solicitor or a cook, can satisfy the requirements at once of the law and of honesty by telling the principal for whom he acts of the commission that he receives, and obtaining his employer's leave to retain it.

These two facts dispose of every attack on the principle of the bill brought forward by the late Lord Russell of Killowen, and meet nine-tenths of the fallacies by which solicitors have tried to answer the unanswerable arguments of Sir Edward Fry.

In the last week of July and the first days of August two legal congresses were held in Paris, one for the comparative history of law, being a section of a more general historical congress, the other for comparative jurisprudence, under the auspices of the Society of Comparative Legislation. No harm was done by the overlapping of their subject-matter, as it was easy to take part in both. Some time must elapse before the proceedings of either are published in a complete form. As every system of law in Europe, and at least one in Asia, was represented, the topics were sufficiently various. Slavonic learning was particularly strong in the persons of Mr. Kovalovsky,—well known of old to English scholars—and Mr. Bogišić, who has returned to Paris after a term of office as Minister of Justice in Montenegro. The Congress of Comparative Jurisprudence has done one thing which, we hope, will be permanently fruitful. A project to the effect (to put it shortly) of establishing a central intelligence office for law and legislation was submitted by Mr. Kelly of the New York Bar, supported by M. Lyon-Caen, with certain modifications which the proposer accepted, and favourably received in principle. A special committee was appointed at the final meeting of the Congress to consider it and take such further action as might seem desirable.

The *Institut de Droit International* has, by a large majority of votes, condemned the theory of *Renvoi*¹. At the Cambridge meeting in 1895 a strong committee was appointed, on the motion of Professor Buzzati, of Pavia, to consider the question, and at Copenhagen, in 1897, it presented an 'Avant-Rapport,' principally with a view to obtaining fresh instructions as to the scope of the inquiry, which some members of the committee thought should include, while others thought it should exclude, the interpretation to be placed by courts upon existing legislative provisions upon the subject. The latter view was adopted by the *Institut*, and the carefully reasoned report upon the theory of *Renvoi*, *Rinvio*, or *Rück- und Weiterverweisung*, presented at the Hague in 1898, was drafted accordingly. It is distinctly hostile to the doctrine, which it formulates as follows: 'La loi étrangère que la LEX FORI déclare applicable pour juger un rapport juridique donné n'est pas la disposition étrangère de droit civil, mais la disposition étrangère de droit international privé correspondante à la disposition de droit international privé de la LEX FORI.'

The discussion of the report, after extending over two days at the Hague, was resumed at Neuchâtel in the present year, and

¹ Cf. L. Q. R. xiv. p. 231.

resulted in the adoption by the *Institut* of the following resolution :
'Chaque législateur, en édictant ses règles positives de droit international privé, doit indiquer quel est le droit matériel directement applicable par ses tribunaux dans les différents cas de conflits ; il ne peut pas soumettre l'application du droit matériel, qu'il a indiqué comme applicable, à la condition que ce droit soit déclaré applicable aussi par la législation dont il fait partie.'

It seems convenient to repeat in a conspicuous place that it is not desirable to send MSS. on approval without previous communication with the Editor, except in very special circumstances ; and that the Editor, except as aforesaid, cannot be in any way answerable for MSS. so sent.

THE CORPORATION SOLE.

PERSONS are either natural or artificial. The only natural persons are men. The only artificial persons are corporations. Corporations are either aggregate or sole.

This, I take it, would be an orthodox beginning for a chapter on the English Law of Persons, and such it would have been at any time since the days of Sir Edward Coke¹. It makes use, however, of one very odd term which seems to approach self-contradiction, namely, the term 'corporation sole,' and the question may be raised, and indeed has been raised, whether our corporation sole is a person, and whether we do well in endeavouring to co-ordinate it with the corporation aggregate and the individual man. A courageous paragraph in Sir William Markby's *Elements of Law*² begins with the words, 'There is a curious thing which we meet with in English law called a corporation sole,' and Sir William then maintains that we have no better reason for giving this name to a rector or to the king than we have for giving it to an executor. Some little debating of this question will do no harm, and may perhaps do some good, for it is in some sort prejudicial to other and more important questions.

A better statement of what we may regard as the theory of corporations that is prevalent in England could hardly be found than that which occurs in Sir Frederick Pollock's book on *Contract*³. He speaks of 'the Roman invention, adopted and largely developed in modern systems of law, of constituting the official character of the holders for the time being of the same office, or the common interest of the persons who for the time being are adventurers in the same undertaking, into an artificial person or ideal subject of legal capacities and duties.' There follows a comparison which is luminous, even though some would say that it suggests doubts touching the soundness of the theory that is being expounded. 'If it is allowable to illustrate one fiction by another, we may say that the artificial person is a fictitious substance conceived as supporting legal attributes.'

It will not be news to readers of this journal that there are nowadays many who think that the personality of the corporation

¹ Co. Lit. 2 a, 250 a.

² Markby, *Elements of Law*, § 145.

³ Pollock, *Contract*, ed. 6, p. 107.

aggregate is in no sense and no sort artificial or fictitious, but is every whit as real and natural as is the personality of a man. This opinion, if it was at one time distinctive of a certain school of Germanists, has now been adopted by some learned Romanists, and also has found champions in France and Italy. Hereafter I may be allowed to say a little about it¹. Its advocates, if they troubled themselves with our affairs, would claim many rules of English law as evidence that favours their doctrine and as protests against what they call 'the Fiction Theory.' They would also tell us that a good deal of harm was done when, at the end of the Middle Ages, our common lawyers took over that theory from the canonists and tried, though often in a half-hearted way, to impose it upon the traditional English materials.

In England we are within a measurable distance of the statement that the only persons known to our law are men and certain organized groups of men which are known as corporations aggregate. Could we make that statement, then we might discuss the question whether the organized group of men has not a will of its own—a real, not a fictitious, will of its own—which is really distinct from the several wills of its members. As it is, however, the corporation sole stops, or seems to stop, the way. It prejudices us in favour of the Fiction Theory. We suppose that we personify offices.

Blackstone, having told us that 'the honour of inventing' corporations 'entirely belongs to the Romans,' complacently adds that 'our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion².' If this be so, we might like to pay honour where honour is due, and to name the name of the man who was the first and true inventor of the corporation sole.

Sir Richard Broke died in 1558, and left behind him a *Grand Abridgement*, which was published in 1568. Now I dare not say that he was the father of 'the corporation sole'; indeed I do not know that he ever used precisely that phrase; but more than once he called a parson a 'corporation,' and, after some little search, I am inclined to believe that this was an unusual statement. Let us look at what he says:

Corporations et Capacities, pl. 41: Vide Trespas in fine ann. 7 E. 4, fo. 12 per Danby: one can give land to a parson and to his successors, and so this is a corporation by the common law, and elsewhere it is agreed that this is mortmain.

¹ Dr. Otto Gierke, of Berlin, has been its principal upholder.

² 1 Comm. 469.

Corporations et Capacities, pl. 68: Vide tithe *Encumbent* 14, that a parson of a church is a corporation in succession to prescribe, to take land in fee, and the like, 39 H. 6, 14 and 7 E. 4, 12.

Encumbent et Glebe, pl. 14 [Marginal note: *Corporacion en le person*:] a parson can prescribe in himself and his predecessor, 39 H. 6, fo. 14; and per Danby a man may give land to a parson and his successors, 7 E. 4, fo. 12; and the same per Littleton in his chapter of Frankalmoin.

The books that Broke vouches will warrant his law, but they will not warrant his language. In the case of Henry VI's reign¹ an action for an annuity is maintained against a parson on the ground that he and all his predecessors have paid it; but no word is said of his being a corporation. In the case of Edward IV's reign we may find Danby's dictum². He says that land may be given to a parson and his successors, and that when the parson dies the donor shall not enter; but there is no talk of the parson's corporateness. So again we may learn from Littleton's chapter on frankalmoin³ that land may be given to a parson and his successors; but again there is no talk of the parson's corporateness.

There is, it is true, another passage in what at first sight looks like Littleton's text which seems to imply that a parson is a body politic, and Coke took occasion of this passage to explain that every corporation is either 'sole or aggregate of many,' and by so doing drew for future times one of the main outlines of our Law of Persons⁴. However, Butler has duly noted the fact that just the words that are important to us at the present moment are not in the earliest editions of the Tenures, and I believe that we should be very rash if we ascribed them to Littleton⁵.

Still the most that I should claim for Broke would be that by applying the term 'corporation' to a parson, he suggested that a very large number of corporations sole existed in England, and so prepared the way for Coke's dogmatic classification of persons. Apparently for some little time past lawyers had occasionally spoken of the chantry priest as a corporation. So early as 1448 a writ is brought in the name of 'John Chaplain of the Chantry of B. Mary of Dale'; objection is taken to the omission of his surname; and to this it is replied that the name in which he sues may

¹ 39 Hen. VI, f. 13 (Mich. pl. 17).

² 7 Edw. IV, f. 12 (Trin. pl. 2).

³ Lit. sec. 134.

⁴ Lit. sec. 413; Co. Lit. 250 a. Other classical passages are Co. Lit. 2 a; *Sutton's Hospital* case, 10 Rep. 29 b.

⁵ Littleton is telling us that no dying seised tells an entry if the lands pass by 'succession.' He is supposed to add: 'Come de prelates, abbates, priours, deans, ou parson desglyse [ou dauter corps politike].' But the words that are here bracketed are not in the Cambridge MS.; nor in the edition by Lettou and Machlinia; nor in the Rouen edition; nor in Pynson's. On the other hand they stand in one, at least, of Redman's editions.

be that by which he is corporate¹. Then it would appear that in 1482 Bryan C.J. and Choke J. supposed the existence of a corporation in a case in which an endowment was created for a single chantry priest. Fitzherbert, seemingly on the authority of an unprinted Year Book, represents them as saying that 'if the king grants me licence to make a chantry for a priest to sing in a certain place, and to give to him and his successors lands to the value of a certain sum, and I do this, that is a good corporation without further words².' Five years later some serjeants, if I understand them rightly, were condemning as void just such licences as those which Bryan and Catesby had discussed, and thereby were proposing to provide the lately crowned Henry VII with a rich crop of forfeitures. Keble opines that such a licence does not create a corporation (apparently because the king cannot delegate his corporation-making power), and further opines that the permission to give land to a corporation that does not already exist must be invalid³. Whether more came of this threat—for such it seems to be—I do not know⁴. Bullying the chantries was not a new practice in the days of Henry VII's son and grandson. In 1454 Romayn's Chantry, which had been confirmed by Edward III and Richard II, stood in need of a private Act of Parliament because a new generation of lawyers was not content with documents which had satisfied their less ingenious predecessors⁵.

Now cases relating to endowed chantry priests were just the cases which might suggest an extension of the idea of corporateness beyond the sphere in which organized groups of men are active. Though in truth it was the law of mortmain, and not any law touching the creation of fictitious personality, which originally sent the founders of chantries to seek the king's licence, still the king was by this time using somewhat the same language about the single chantry priest that he had slowly learned to use about bodies of burgesses and others. The king, so the phrase went, was enabling the priest to hold land to himself and his successors. An investigation of licences for the formation of chantries might lead to some good results. At present, however, I cannot easily believe

¹ 27 Hen. VI, f. 3 (Mich. pl. 24): 'poet estre entende que il est corporate par tiel nom.'

² Fitz. Abr. Graunt, pl. 30, citing T. 22 Edw. IV and M. 21 Edw. IV, 56. The earlier part of the case stands in Y. B. 21 Edw. IV, f. 55 (Mich. pl. 28). The case concerned the municipal corporation of Norwich, and the dictum must have been gratuitous.

³ 2 Hen. VII, f. 13 (Hil. pl. 16).

⁴ 20 Hen. VII, f. 7 (Mich. pl. 17): Rede J. seems to say that such a licence would make a corporation.

⁵ Rot. Parl. v. 258. It had been supposed for a hundred and twenty years that there had been a chantry sufficiently founded in law and to have stood stable in perpetuity 'which for certain diminution of the form of making used in the law at these days is not held sufficient.'

that, even when the doom of the chantries was not far distant, English lawyers were agreed that the king could make, and sometimes did make, a corporation out of a single man or out of that man's official character. So late as the year 1522, the year after Richard Broke took his degree at Oxford, Fineux, C. J. B. R., was, if I catch the sense of his words, declaring that a corporation sole would be an absurdity, a nonentity. 'It is argued,' he said, 'that the Master and his Brethren cannot make a gift to the Master, since he is the head of the corporation. Therefore let us see what a corporation is and what kinds of corporations there are. A corporation is an aggregation of head and body: not a head by itself, nor a body by itself; and it must be consonant to reason, for otherwise it is worth nought. For albeit the king desires to make a corporation of J. S., that is not good, for common reason tells us that it is not a permanent thing and cannot have successors¹.' The Chief Justice goes on to speak of the Parliament of King, Lords, and Commons as a corporation by the common law. He seems to find the essence of corporateness in the permanent existence of the organized group, the 'body' of 'members,' which remains the same body though its particles change, and he denies that this phenomenon can exist where only one man is concerned. There is no permanence. The man dies and, if there is office or benefice in the case, he will have no successor until time has elapsed and a successor has been appointed. That is what had made the parson's case a difficult case for English lawyers. Fineux was against feigning corporateness where none really existed. At any rate, a good deal of his judgment seems incompatible with the supposition that 'corporation sole' was in 1522 a term in current use.

That term would never have made its fortune had it not been applied to a class much wider and much less exposed to destructive criticism than was the class of permanently endowed chantry priests. That in all the Year Books a parochial rector is never called a corporation I certainly dare not say. Still, as a note at the end of this paper may serve to show, I have unsuccessfully sought the word in a large number of places where it seemed likely to be found if ever it was to be found at all. Such places are by no means rare. Not unfrequently the courts were compelled to consider what a parson could do and could not do, what

¹ 14 Hen. VIII, f. 3 (Mich. pl. 2): 'Car coment que le roy veut faire corporation a J. S. ceo n'est bon, pur ceo que comon reson dit que n'est chose permanente et ne peut aver successor.' Considering the context, I do not think that I translate this unfairly, though the words 'faire corporation a J. S.' may not be exactly rendered or renderable. The king, we may say, cannot make a corporation which shall have J. S. for its basis. ['Grant to J. S. to be a corporation' seems the most plausible version.—Ed.]

leases he could grant, what charges he could create, what sort of estate he had in his glebe. Even in Coke's time what we may call the theoretical construction of the parson's relation to the glebe had hardly ceased to be matter of debate. 'In whom the fee simple of the glebe is,' said the great dogmatist, 'is a question in our books¹.' Over the glebe, over the parson's freehold, the parson's fee, the parson's power of burdening his church or his successors with pensions or annuities, there had been a great deal of controversy; but I cannot find that into this controversy the term 'corporation' was introduced before the days of Richard Broke.

If now we turn from the phrase to the legal phenomena which it is supposed to describe, we must look for them in the ecclesiastical sphere. Coke knew two corporations sole that were not ecclesiastical, and I cannot find that he knew more. They were a strange pair: the king² and the chamberlain of the city of London³. As to the civic officer, a case from 1468 shows us a chamberlain suing on a bond given to a previous chamberlain 'and his successors.' The lawyers who take part in the argument say nothing of any corporation sole, and seem to think that obligations could be created in favour of the Treasurer of England and his successors or the Chief Justice and his successors⁴. As to the king, I strongly suspect that Coke himself was living when men first called the king a corporation sole, though many had called him the head of a corporation. But of this at another time. The centre of sole corporateness, if we may so speak, obviously lies among ecclesiastical institutions. If there are any, there are thousands of corporations sole within the province of church property law.

But further, we must concentrate our attention upon the parish parson. We may find the Elizabethan and Jacobean lawyers applying the new term to bishops, deans, and prebendaries; also retrospectively to abbots and priors. Their cases, however, differed in what had been a most important respect from the case of the parochial rector. They were members, in most instances they were heads, of corporations aggregate. As is well known, a disintegrating process had long been at work within the ecclesiastical groups, more especially within the cathedral groups⁵. Already when the Year Books begin their tale this process had gone far. The bishop has lands that are severed from the lands of the cathedral chapter or cathedral monastery; the dean has lands, the prebendary has lands or other sources of revenue. These partitions have ceased

¹ Co. Lit. 340 b, 341 a.

² *Sutton's Hospital case*, 10 Rep. 29 b.

³ *Fulwood's case*, 4 Rep. 65 a.

⁴ 8 Edw. IV, f. 18 (Mich. pl. 29).

⁵ Lib. Ass. f. 117, ann. 25, pl. 8: 'All the cathedral churches and their possessions were at one time a gross.'

to be merely matters of internal economy; they have an external validity which the temporal courts recognize¹. Still, throughout the Middle Ages it is never forgotten that the bishop who as bishop holds lands severed from the lands of the chapter or the convent holds those lands as head of a corporation of which canons or monks are members. This is of great theoretical importance, for it obviates a difficulty which our lawyers have to meet when they consider the situation of the parochial rector. In the case of the bishop a permanent 'body' exists in which the ownership, the full fee simple, of lands can be reposed. 'For,' as Littleton says, 'a bishop may have a writ of right of the tenements of the right of his church, for that the right is in his chapter, and the fee simple abideth in him and in his chapter².' The application of the term 'corporation sole' to bishops, deans, and prebendaries marked the end of the long disintegrating process, and did some harm to our legal theories. If the episcopal lands belong to the bishop as a 'corporation sole,' why, we may ask, does he require the consent of the chapter if he is to alienate them? The 'enabling statute' of Henry VIII and the 'disabling statutes' of Elizabeth deprived this question of most of its practical importance. Thenceforward in the way of grants or leases the bishop could do little with that he could not do without the chapter's consent³. It is also to be remembered that an abbot's powers were exceedingly large; he ruled over a body of men who were dead in the law, and the property of his 'house' or 'church' was very much like his own property. Even if without the chapter's consent he alienated land, he was regarded, at least by the temporal courts, much rather as one who was attempting to wrong his successors than as one who was wronging that body of 'incapables' of which he was the head. It is to be remembered also that in England many of the cathedrals were monastic. This gave our medieval lawyers some thoughts about the heads of corporations aggregate and about the powerlessness of headless bodies which seem strange to us. A man might easily slip from the statement that the abbey is a corporation into the statement that the abbot is a corporation, and I am far from saying that the latter phrase was never used so long as England had abbots in it⁴; but, so far as I can see, the 'corpora-

¹ For instance, *Chapter v. Dean of Lincoln*, 9 Edw. III, f. 18 (Trin. pl. 3) and f. 33 (Mich. pl. 33).

² Litt. sec. 645. 6 Edw. III, f. 10, 11 (Hil. pl. 28), it is said in argument, 'The right of the church [of York] abides rather in the dean and chapter than in the archbishop, car ceo ne mourt pas.' This case is continued in 6 Edw. III, f. 50 (Mich. pl. 50).

³ See Coke's exposition, Co. Lit. 44 a, ff; and Blackstone's, 2 Com. 319.

⁴ Apparently in 1487 (3 Hen. VII, f. 11, Mich. pl. 1), Vavasor J. said 'chescun abbe est corps politique, car il ne poet rien prendre forsque al use del Meason.'

tion sole' makes its entry into the cathedral along with the royal supremacy and other novelties. Our interest lies in the parish church¹.

Of the parish church there is a long story to be told. Dr. Stutz is telling it in a most interesting manner². Our own Selden, however, was on the true track; he knew that the patron had once been more than a patron³, and we need go no further than Blackstone's Commentaries to learn that Alexander III did something memorable in this matter⁴. To be brief: in the twelfth century we may regard the patron as one who has been the owner of church and glebe and tithe, but an owner from whom ecclesiastical law has gradually been sucking his ownership. It has been insisting with varying success that he is not to make such profit out of his church as his heathen ancestor would have made out of a god-house. He must demise the church and an appurtenant manse to an ordained clerk approved by the bishop. The ecclesiastical 'benefice' is the old Frankish *beneficium*, the old land-loan of which we read in all histories of feudalism⁵. In the eleventh century occurred the world-shaking quarrel about investitures. Emperors and princes had been endeavouring to treat even ancient cathedrals as their 'owned churches.' It was over the investiture of bishops that the main struggle took place; nevertheless, the principle which the Hildebrandine papacy asserted was the broad principle, 'No investiture by the lay hand.' Slowly in the twelfth century, when the more famous dispute had been settled, the new rule was made good by constant pressure against the patrons or owners of the ordinary churches. Then a great lawyer, Alexander III (1159-81), succeeded, so we are told, in finding a new 'juristic basis' for that right of selecting a clerk which could not be taken away from the patron. That right was to be conceived no longer as an offshoot of ownership, but as an outcome of the Church's gratitude towards

¹ Is the idea of the incapacity of a headless corporation capable of doing harm at the present day? Grant, *Corporations*, 110, says that 'if a master of a college devise lands to the college, they cannot take, because at the moment of his death they are an incomplete body.' His latest authority is Dalison, 31. In 1863 Dr. Whewell or his legal adviser was careful about this matter. A devise was made 'unto the Master, Fellows, and Scholars of Trinity College aforesaid and their successors for ever, or, in case that devise would fail of effect in consequence of there being no Master of the said College at my death, then to the persons who shall be the Senior Fellows of the said College at my decease and their heirs until the appointment of a Master of such College, and from and after such appointment (being within twenty-one years after my death) to the Master, Fellows, and Scholars of the said College and their successors for ever.' Thus international law was endowed while homage was paid to the law of England. But perhaps I do wrong in attracting attention to a rule that should be, if it is not, obsolete.

² Ulrich Stutz, *Geschichte des kirchlichen Benefizialwesens*. Only the first part has yet appeared, but Dr. Stutz sketched his programme in *Die Eigenkirche*, Berlin, 1895.

³ *History of Tithes*, c. 12.

⁴ 2 Bl. Com. 23.

⁵ Stutz, *Lehen und Pfründe*, *Zeitschrift der Savigny-Stiftung*, Germ. Abt. xx. 213.

a pious founder. Thus was laid the groundwork of the classical law of the Catholic Church about the *ius patronatus*; and, as Dr. Stutz says, the Church was left free to show itself less and less grateful as time went on.

One part of Pope Alexander's scheme took no effect in England. Investiture by the lay hand could be suppressed. The parson was to be instituted and inducted by his ecclesiastical superiors. Thus his rights in church and glebe and tithe would no longer appear as rights derived out of the patron's ownership, and the patron's rights, if they were to be conceived—and in England they certainly would be conceived—as rights of a proprietary kind, would be rights in an incorporeal thing, an 'objectified' advowson. But with successful tenacity Henry II and his successors asserted on behalf of the temporal forum no merely concurrent, but an absolutely exclusive jurisdiction over all disputes, whether possessory or petitory, that touched the advowson. One consequence of this most important assertion was that the English law about this matter strayed away from the jurisprudence of the Catholic Church. If we compare what we have learned as the old English law of advowsons with the *ius commune* of the Catholic Church as it is stated by Dr. Hinschius we shall see remarkable differences, and in all cases it is the law of England that is the more favourable to patronage¹. Also in England we read of survivals which tell us that the old notion of the patron's ownership of the church died hard².

But here we are speaking of persons. If the patron is not, who then is the owner of the church and glebe? The canonist will 'subjectify' the church. The church (subject) owns the church (object). Thus he obtains temporary relief³. There remains the question how this owning church is to be conceived; and a trouble-

¹ Kirchenrecht, vol. iii. p. 1 ff. In particular, English law regards patronage as normal. When the ordinary freely chooses the clerk, this is regarded as an exercise of patronage; and so we come by the idea of a 'collative advowson.' On the other hand, the catholic canonist should, so I understand, look upon patronage as abnormal, should say that when the bishop selects a clerk this is an exercise not of patronage but of 'jurisdiction,' and should add that the case in which a bishop as bishop is patron of a benefice within his own diocese, though not impossible, is extremely rare (Hinschius, op. cit. pp. 35-7). To a king who was going to exercise the 'patronage' annexed to vacant bishoprics, but could not claim spiritual jurisdiction, this difference was of high importance.

² See Pike, Feoffment and Livery of Incorporeal Hereditaments, LAW QUARTERLY REVIEW, v. 29, 35 ff. 43 Edw. III, f. 1 (Hil. pl. 4): advowson conveyed by feoffment at church door. 7 Edw. III, f. 5 (Hil. pl. 7): Herle's dictum that not long ago men did not know what an advowson was, but granted churches. 11 Hen. VI, f. 4 (Mich. pl. 8): per Martin, an advowson will pass by livery, and in a writ of right of advowson the summons must be made upon the glebe. 38 Edw. III, f. 4 (scire facias): per Finchden, perhaps in old time the law was that patron without parson could charge the glebe. 9 Hen. VI, f. 52 (Mich. pl. 35): the advowson of a church is assets, for it is an advantage to advance one's blood or one's friend. 5 Hen. VII, f. 37 (Trin. pl. 3): per Vavasour and Danvers, an advowson lies in tenure, and one may distrain [for the services] in the churchyard.

³ See Gierke, Genossenschaftsrecht, vol. iii. passim.

some question it is. What is the relation of the *ecclesia particularis* (church of Ely or of Trumpington) to the universal church? Are we to think of a *persona ficta*, or of a patron saint, or of the Bride of Christ, or of that vast corporation aggregate the *congregatio omnium fidelium*, or of Christ's vicar at Rome, or of Christ's poor throughout the world; or shall we say that walls are capable of retaining possession? Mystical theories break down: persons who can never be in the wrong are useless in a court of law. Much might be and much was written about these matters, and we may observe that the extreme theory which places the ownership of all church property in the pope was taught by at least one English canonist¹. Within or behind a subjectified church lay problems which English lawyers might well endeavour to avoid.

On the whole it seems to me that a church is no person in the English temporal law of the later Middle Ages. I do not mean that our lawyers maintain one consistent strain of language. That is not so. They occasionally feel the attraction of a system which would make the parson a guardian or curator of an ideal ward. *Ecclesia fungitur vice minoris* is sometimes on their lips². The thought that the 'parson' of a church was or bore the 'person' of the church was probably less distant from them than it is from us, for the two words long remained one word for the eye and for the ear. Coke, in a theoretical moment, can teach that in the person of the parson the church may sue for and maintain 'her' right³. Again, it seems that conveyances were sometimes made to a parish church without mention of the parson⁴, and when an action for land is brought against a rector he will sometimes say, 'I found my church seised of this land, and therefore pray aid of patron and ordinary'.

We may, however, remember at this point that in modern judgments and in Acts of Parliament lands are often spoken of as belonging to 'a charity.' Still, our books do not teach us that charities are persons. Lands that belong to a charity are owned, if not by a corporation, then by some man or men. Now we must not press this analogy between medieval churches and modern charities very far, for medieval lawyers were but slowly elaborating that idea of a trust which bears heavy weights in modern times and enables all religious bodies, except one old-fashioned body, to conduct their affairs conveniently enough without an apparatus of corporations sole. Still, in the main, church and charity seem alike. Neither ever sues, neither is ever sued.

¹ J. de Athon (ed. 1679), p. 76, gl. ad v. *summorum pontificum*.

² Pollock and Maitland, *Hist. Eng. Law*, ed. 2, i. 503.

³ Co. Lit. 300 b.

⁴ 11 Hen. IV, f. 84 (Trin. pl. 34). But see 8 Hen. V, f. 4 (Hil. pl. 15).

The parson holds land 'in right of his church.' So the king can hold land or claim a wardship or a presentation, sometimes 'in right of his crown,' but sometimes 'in right of' an escheated honour or a vacant bishopric. So too medieval lawyers were learning to say that an executor will own some goods in his own right and others *en auter droit*.

The failure of the church to become a person for English temporal lawyers is best seen in a rule of law which can be traced from Bracton's day to Coke's through the length of the Year Books. A bishop or an abbot can bring a writ of right, a parson cannot. The parson requires a special action, the *iurata utrum*; it is a *singulare beneficium*¹ provided to suit his peculiar needs. The difficulty that had to be met was this:—You can conceive ownership, a full fee simple, vested in a man 'and his heirs,' or in an organized body of men such as a bishop and chapter, or abbot and convent, but you cannot conceive it reposing in the series, the intermittent series, of parsons. True, that the *iurata utrum* will be set to inquire whether a field belongs (*pertinet*) to the plaintiff's 'church.' But the necessity for a special action shows us that the *pertinet* of the writ is thought of as the *pertinet* of appurtenancy, and not as the *pertinet* of ownership. As a garden belongs to a house, as a stopper belongs to a bottle, not as house and bottle belong to a man, so the glebe belongs to the church.

If we have to think of 'subjectification,' we have to think of 'objectification' also. Some highly complex 'things' were made by medieval habit and perceived by medieval law. One such thing was the manor; another such thing was the church. Our pious ancestors talked of their churches much as they talked of their manors. They took esplees of the one and esplees of the other; they exploited the manor and exploited the church. True, that the total sum of right, valuable right, of which the church was the object might generally be split between parson, patron, and ordinary. Usually the claimant of an advowson would have to say that the necessary exploitation of the church had been performed, not by himself, but by his presentee. But let us suppose the church impropriated by a religious house, and listen to the head of that house declaring how to his own proper use he has taken esplees in oblations and obventions, great tithes, small tithes, and other manner of tithes². Or let us see him letting a church to farm for a term of years at an annual rent³. The church was in many contexts a complex thing, and by no means *extra commercium*. I doubt if it is generally known how much was done in the way of

¹ Bracton, f. 286 b.

² 5 Edw. III, f. 18 (Pasch. pl. 18).

³ 9 Hen. V, f. 8 (Mich. pl. 1).

charging 'churches' with annuities or pensions in the days of Catholicism. On an average every year seems to produce one law suit that is worthy to be reported and has its origin in this practice. In the Year Books the church's objectivity as the core of an exploitable and enjoyable mass of wealth is, to say the least, far more prominent than its subjectivity¹.

'If,' said Rolfe Serj., in 1421, 'a man gives or devises land to God and the church of St. Peter of Westminster, his gift is good, for the church is not the house nor the walls, but is to be understood as the *ecclesia spiritualis*, to wit, the abbot and convent, and because the abbot and convent can receive a gift, the gift is good . . . but a parish church can only be understood as a house made of stones and walls and roof which cannot take a gift or feoffment².'

We observe that God and St. Peter are impracticable feoffees, and that the learned serjeant's 'spiritual church' is a body of men at Westminster. It seems to me that throughout the Middle Ages there was far more doubt than we should expect to find as to the validity of a gift made to 'the [parish] church of X,' or to 'the parson of X and his successors,' and that Broke was not performing a needless task when he vouched Littleton and Danby to warrant a gift that took the latter of these forms. Not much land was, I take it, being conveyed to parish churches or parish parsons, while for the old glebe the parson could have shown no title deeds. It had been acquired at a remote time by a slow expropriation of the patron.

The patron's claim upon it was never quite forgotten. Unless I have misread the books, a tendency to speak of the church as a person grows much weaker as time goes on. There is more of it in Bracton than in Littleton or Fitzherbert³. English lawyers were no longer learning from civilians and canonists, and were con-

¹ Sometimes the thing that is let to farm is called, not the church, but the rectory. This, however, does not mean merely the rectory house. 21 Hen. VII, f. 21 (Pasch. pl. 11): 'The church, the churchyard, and the tithe make the rectory, and under the name of rectory they pass by parol.' See *Greenslade v. Darby*, L. R. 3 Q. B. 421: The lay impropiator's right to the herbage of the churchyard maintained against a perpetual curate: a learned judgment by Blackburn J. See also Lyndwood, Provinciale, pp. 154 ff., as to the practice of letting churches. 30 Edw. III, f. 1: Action of account against bailiff of the plaintiff's church; unsuccessful objection that defendant should be called bailiff, not of the church, but of a rectory: *car esglise est a les parochiens, et nemy le soen* [the parson's]. This is the only instance that I have noticed in the Year Books of any phrase which would seem to attribute to the parishioners any sort of proprietary right in the church.

² 8 Hen. V, f. 4 (Hil. pl. 15). I omit some words expressing the often recurring theory that the conventual church cannot accept a gift made when there is no abbot. Headless bodies cannot act, but they can retain a right.

³ 21 Edw. IV, f. 61 (Mich. pl. 32): per Pigot, fines were formerly received which purported to convey *Deo et ecclesiae*, but the judges of those days were ignorant of the law. 9 Hen. VII, f. 11 (Mich. pl. 6): conveyances to God and the church are still held valid if made in old time; they would not be valid if made at the present day.

structing their grand scheme of estates in land. It is with their heads full of 'estates' that they approach the problem of the glebe, and difficult they find it. At least with the consent of patron and ordinary, the parson can do much that a tenant for life cannot do¹; and, on the other hand, he cannot do all that can be done by a tenant in fee simple. It is hard to find a niche for the rector in our system of tenancies. But let us observe that this difficulty only exists for men who are not going to personify churches or offices.

There is an interesting discussion in 1430². The plaintiff's ancestor had recovered land from a parson, the predecessor of the defendant, by writ of *Cessavit*; he now sues by *Scire facias*, and the defendant prays aid of the patron; the question is whether the aid prayer is to be allowed.

Cottesmore J. says:—

'I know well that a parson has only an estate for the term of his life; and it may be that the plaintiff after the judgment released to the patron, and such a release would be good enough, for the reversion of the church is in him [the patron], and this release the parson cannot plead unless he has aid. And I put the case that a man holds land of me for the term of his life, the reversion being in me; then if one who has right in the land releases to me who am in reversion, is not that release good? So in this case.'

Paston J. takes the contrary view:—

'I learnt for law that if *Praecipe quod reddat* is brought against an abbot or a parson, they shall never have aid, for they have a fee simple in the land, for the land is given to them and their successors, so that no reversion is reserved upon the gift. . . . If a writ of right is brought against them they shall join the mise upon the *mere droit*, and that proves that they have a better estate than for term of life. And I have never seen an estate for life with the reversion in no one; for if the parson dies the freehold of the glebe is not in the patron, and no writ for that land is maintainable against any one until there is another parson. So it seems to me that aid should not be granted.'

Then speaks Babington C. J., and, having put an ingenious case in which, so he says, there is a life estate without a reversion, he proceeds to distinguish the case of the abbot from that of the parson:—

'When an abbot dies seised the freehold always remains in the

¹ Even without the active concurrence of patron and ordinary, who perhaps would make default when prayed in aid, the parson could do a good deal in the way of diminishing his successor's revenue by suffering collusive actions. See e.g. 4 Hen. VII, f. 2 (Hil. fol. 4), where the justices in Cam. Scac. were divided, four against three.

² 8 Hen. VI, f. 24 (Hil. pl. 10).

house (*meason*) and the house cannot be void . . . but if a parson dies, then the church is empty and the freehold in right is in the patron, notwithstanding that the patron can take no advantage of the land; and if a recovery were good when the patron was not made party, then the patronage would be diminished, which would be against reason. So it seems to me that [the defendant] shall have aid.'

Two other judges, Strangways and Martin, are against the aid prayer; Martin rejects the theory that the parson is tenant for life, and brings into the discussion a tenant in tail after possibility of issue extinct. On the whole the case is unfavourable to the theory which would make the parson tenant for life and the patron reversioner, but that this theory was held in 1430 by a Chief Justice of the Common Pleas seems plain and is very remarkable. The weak point in the doctrine is the admission that the patron does not take the profits of the vacant church. These, it seems settled, go to the ordinary¹, so that the patron's 'reversion' (if any) looks like a very nude right. But the Chief Justice's refusal to repose a right in an empty 'church,' while he will place one in a 'house' that has some monks in it, should not escape attention.

Nearly a century later, in 1520, a somewhat similar case came before the court², and we still see the same diversity of opinion. Broke J. (not Broke of the Abridgement) said that the parson had the fee simple of the glebe *in iure ecclesiae*.

'It seems to me,' said Pollard J., 'that the fee simple is in the patron; for [the parson] has no inheritance in the benefice and the fee cannot be in suspense, and it must be in the patron, for the ordinary only has power to admit a clerk. And although all parsons are made by the act of the ordinary, there is nothing in the case that can properly be called succession. For if land be given to a parson and his successor, that is not good, for he [the parson] has no capacity to take this; but if land be given *Priori et Ecclesiae* that is good, because there is a corporation. . . . And if the parson creates a charge, that will be good only so long as he is parson, for if he dies or resigns, his successor shall hold the land discharged; and this proves that the parson has not the fee simple. But if in time of vacation patron and ordinary charge the land, the successor shall hold it charged, for they [patron and ordinary] had at the time the whole interest³.'

Eliot J. then started a middle opinion:—

'It seems to me that the parson has the fee *in iure ecclesiae*, and

¹ 11 Hen. VI, f. 4 (Mich. pl. 8): per Danby, the ordinary shall have the occupation and all the profit. 9 Hen. V, f. 14 (Mich. pl. 19) accord. See Stat. 28 Hen. VIII, c. 11, which gives the profits to the succeeding parson.

² 12 Hen. VIII, f. 7 (Mich. pl. 1).

³ Apparently Belknap J. had said that such a charge would be good: Fitz. Abr. Annuities, pl. 53 (8 Ric. II).

not the patron—as one is seised in fee *in iure uxoris suae*—and yet for some purposes he is only tenant for life. So tenant in tail has a fee tail, and yet he has only for the term of his life, for if he makes a lease or grants a rent charge, that will be only for the term of his life. . . . As to what my brother Pollard says, namely, that in time of vacation patron and ordinary can create a charge, that is not so.’

Then Brudenel C. J. was certain that the parson has a fee simple :—

‘He has a fee simple by succession, as an heir [has one] by inheritance, and neither the ordinary nor the patron gives this to the parson.’

Pollard’s opinion was belated; but we observe that on the eve of the Reformation it was still possible for an English judge to hold that the ownership, the fee simple, of the church is in the patron. And at this point it will not be impertinent to remember that even at the present day timber felled on the glebe is said to belong to the patron¹.

In the interval between these two cases Littleton had written. He rejected the theory which would place the fee simple in the patron; but he also rejected that which would place it in the parson. Of any theory which would subjectify the church or the parson’s office or dignity he said nothing; and nothing of any corporation sole. Let us follow his argument.

He is discussing ‘discontinuance’ and has to start with this, that if a parson or vicar grants land which is of the right of his church and then dies or resigns, his successor may enter². In other words, there has been no discontinuance. ‘And,’ he says, ‘I take the cause to be for that the parson or vicar that is seised as in right of his church hath no right of the fee simple in the tenements, and the right of the fee simple doth not³ abide in another person.’ That, he explains, is the difference between the case of the parson and the case of a bishop, abbot, dean, or master of a hospital; their alienations may be discontinuances, his cannot; ‘for a bishop may have a writ of right of the tenements of the right of the church, for that the right is in his chapter, and the fee simple abideth in him and his chapter. . . . And a master of a hospital may have a writ of right because the right remaineth in him and in his *confreres*, &c.; and so in other like cases. But a parson or vicar cannot have

¹ *Sowerby v. Fryer* (1869), L. R. 8 Eq. 417, 423: James V. C.: ‘I never could understand why a vicar who has wrongfully cut timber should not be called to account for the proceeds after he has turned it into money, in order that they may be invested for the benefit of the advowson; *it being conceded that the patron is entitled to the specific timber.*’

² Litt. sec. 643.

³ There are various readings, but the argument seems plainly to require this ‘not.’

a writ of right, &c.' A discontinuance, if I rightly understand the matter, involves the alienation of that in which the alienor has some right, but some right is vested in another person. In the one case the bishop alienates what belongs to him and his chapter; in the other case the parson alienates what belongs to no one else.

Then we are told¹ that the highest writ that a parson or vicar can have is the *Utrum*, and that this 'is a great proof that the right of fee is not in them, nor in others. But the right of the fee simple is in abeyance; that is to say, that it is only in the remembrance, intendment, and consideration of law, for it seemeth to me that such a thing and such a right which is said in divers books to be in abeyance is as much as to say in Latin, *Talis res, vel tale rectum, quæ vel quod non est in homine adtunc superstite, sed tantummodo est et consistit in consideratione et intelligentia legis, et, quod alii dixerunt, talem rem aut tale rectum fore in nubibus.*' Yes, rather than have any dealings with fictitious persons, subjectified churches, personified dignities, corporations that are not bodies, we will have a subjectless right, a fee simple in the clouds².

Then in a very curious section Littleton³ has to face the fact that the parson with the assent of patron and ordinary can charge the glebe of the parsonage perpetually. Thence, so he says, some will argue that these three persons, or two or one of them, must have a fee simple. Littleton must answer this argument. Now this is one of those points at which a little fiction might give us temporary relief. We might place the fee simple in a fictitious person, whose lawfully appointed guardians give a charge on the property of their imaginary ward. We might refer to the case of a town council which sets the common seal to a conveyance of land which belongs to the town. But, rather than do anything of the kind, Littleton has recourse to a wholly different principle.

The charge has been granted by parson, patron, and ordinary, and then the parson dies. His successor cannot come to the church but by the presentment of the patron and institution of the ordinary, 'and for this cause he ought to hold himself content and agree to that which his patron and the ordinary have lawfully done before.' In other words, the parson is debarred by decency and gratitude from examining the mouth of the gift horse. No one compelled him to accept the benefice. Perhaps we might say that by his own act he is estopped from quarrelling with the past acts of his benefactors. Such a piece of reasoning would surely be impossible to

¹ Lit. sec. 646.

² Apparently the talk about a fee simple *in nubibus* began in debates over contingent remainders: 11 Hen. IV, f. 74 (Trin. pl. 14).

³ Lit. sec. 648.

any one who thought of the church or the rector's office as a person capable of sustaining proprietary rights.

Before Littleton's Tenures came to Coke's hands, Broke or some one else had started the suggestion that a parson was a corporation, or might be likened to a corporation. Apparently that suggestion was first offered by way of explaining how it came about that a gift could be made to a parson and his successors. Now it seems to me that a speculative jurist might have taken advantage of this phrase in order to reconstruct the theory of the parson's relation to the glebe. He might have said that in this case, as in the case of the corporation aggregate, we have a *persona ficta*, an ideal subject of rights, in which a fee simple may repose; that the affairs of this person are administered by a single man, in the same way in which the affairs of certain other fictitious persons are administered by groups of men; and that the rector therefore must be conceived not as a proprietor but as a guardian, though his powers of administration are large, and may often be used for his own advantage. And Coke, in his more speculative moments, showed some inclination to tread this path. Especially is this the case when he contrasts 'persons natural created of God, as J. S., J. N., &c., and persons incorporate and politic created by the policy of man,' and then adds that the latter are 'of two sorts, viz. aggregate or sole'.¹ But to carry that theory through would have necessitated a breach with traditional ideas of the parson's estate and a distinct declaration that Littleton's way of thinking had become antiquated.² As it is, when the critical point is reached and we are perhaps hoping that the new-found corporation sole will be of some real use, we see that it gives and can give Coke no help at all, for, after all, Coke's corporation sole is a man: a man who fills an office and can hold land 'to himself and his successors,' but a mortal man.

When that man dies the freehold is in abeyance. Littleton had said that this happened 'if a parson of a church dieth.' Coke adds³: 'So it is of a bishop, abbot, dean, archdeacon, prebend, vicar, and of every other sole corporation or body politic, presentative, elective, or donative, which inheritances put in abeyance are by some called *haereditates iacentes*.' So here we catch our corporation sole *in articulo mortis*. If God did not create him, then neither the inferior not yet the superior clergy are God's creatures.

So much as to the state of affairs when there is no parson: the freehold is in abeyance, and 'the fee and right is in abeyance.' On the other hand, when there is a parson then, says Coke⁴, 'for the

¹ Co. Litt. 2 a.

² In *Wythers v. Iseham*, Dyer, f. 70 (pl. 43), the case of the parson had been noticed as the only exception to the rule that the freehold could not be in abeyance.

³ Co. Litt. 342 b.

⁴ Ibid. 341 a.

benefit of the church and of his successor he is in some cases esteemed in law to have a fee qualified; but, to do anything to the prejudice of his successor, in many cases the law adjudgeth him to have in effect but an estate for life.' And again, 'It is evident that to many purposes a parson hath but in effect an estate for life, and to many a qualified fee simple, but the entire fee and right is not in him.'

This account of the matter seems to have been accepted as final. Just at this time the Elizabethan statutes were giving a new complexion to the practical law. The parson, even with the consent of patron and ordinary, could no longer alienate or charge the glebe, and had only a modest power of granting leases. Moreover, as the old real actions gave place to the action of ejectment, a great deal of the old learning fell into oblivion. Lawyers had no longer to discuss the parson's aid prayer or his ability or inability to join the mise on the *mere droit*, and it was around such topics as these that the old indecisive battles had been fought. Coke's theory, though it might not be neat, was flexible: for some purposes the parson has an estate for life, for others a qualified fee. And is not this the orthodoxy of the present day? The abeyance of the freehold during the vacancy of the benefice has the approval of Mr. Challis¹; the 'fee simple qualified' appears in Sir H. Elphinstone's edition of Mr. Goodeve's book².

Thus, so it seems to me, our corporation sole refuses to perform just the first service that we should require at the hands of any reasonably useful *persona ficta*. He or it refuses to act as the bearer of a right which threatens to fall into abeyance or dissipate itself among the clouds for want of a 'natural' custodian. I say 'he or it'; but which ought we to say? Is a beneficed clergyman—for instance, the Rev. John Styles—a corporation sole, or is he merely the administrator or representative of a corporation sole? Our Statute Book is not very consistent. When it was decreeing the Disestablishment of the Irish Church it declared that on January 1, 1871, every ecclesiastical corporation in Ireland, whether sole or aggregate, should be dissolved³, and it were needless to say that this edict did not contemplate a summary dissolution of worthy divines. But turn to a carefully worded Statute of Limitations. 'It shall be lawful for any archbishop, bishop, dean, prebendary, parson, master of a hospital, or other spiritual or eleemosynary corporation sole to make an entry or

¹ Challis, *Real Property*, ed. 2, p. 91.

² Goodeve, *Real Property*, ed. 4, pp. 85, 133. See the remarks of Jessel M. R. in *Mulliner v. Midland Railway Co.*, 11 Ch. D. 622.

³ 32 & 33 Vict. c. 42, sec. 13.

distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which *the right of such corporation sole or of his predecessor . . . shall have first accrued*¹. Unquestionably for the draftsman of this section the corporation sole was, as he was for Coke, a man, a mortal man.

If our corporation sole really were an artificial person created by the policy of man we ought to marvel at its incompetence. Unless custom or statute aids it, it cannot (so we are told) own a chattel, not even a chattel real². A different and an equally inelegant device was adopted to provide an owning 'subject' for the ornaments of the church and the minister thereof—adopted at the end of the Middle Ages by lawyers who held themselves debarred by the theory of corporations from frankly saying that the body of parishioners is a corporation aggregate. And then we are also told that in all probability a corporation sole 'cannot enter into a contract except with statutory authority or as incidental to an interest in land³.' What then can this miserable being do? It cannot even hold its glebe tenaciously enough to prevent the freehold falling into abeyance whenever a parson dies.

When we turn from this mere ghost of a fiction to a true corporation, a corporation aggregate, surely the main phenomenon that requires explanation, that sets us talking of personality and, it may be, of fictitious personality, is this, that we can conceive and do conceive that legal transactions, or acts in the law, can take place and do often take place between the corporation of the one part and some or all of the corporators of the other part. A beautiful modern example⁴ shows us eight men conveying a colliery to a company of which they are the only members; and the Court of Appeal construes this as a 'sale' by eight persons to a ninth person, though the price consists not in cash, but in the whole share capital of the newly formed corporation. But to all appearance there can be no legal transaction, no act in the law, between the corporation sole and the natural man who is the one and only corporator. We are told, for example, that 'a sole corporation, as a bishop or a parson, cannot make a lease to himself, because he cannot be both lessor and lessee⁵.' We are told that 'if a bishop hath lands in both capacities he cannot give or take to or from himself⁶.' Those who use such phrases as these show plainly

¹ 3 & 4 Will. IV, c. 27, sec. 29.

² *Fulwood's case*, 4 Rep. 65 a; *Arundel's case*, Hob. 64.

³ Pollock, *Contract*, ed. 6, p. 109. The principal modern authority is *Howley v. Knight*, 14 Q. B. 240.

⁴ *Foster & Son, Lim. v. Com. of Inland Rev.* [1894] 1 Q. B. 516.

⁵ *Salter v. Grosvenor*, 8 Mod. 303, 304.

⁶ *Wood v. Mayor, &c., of London*, Balk. 396, 398. See also Grant, *Corporations*, 635.

enough that in their opinion there is no second 'person' involved in the cases of which they speak: 'he' is 'himself,' and there is an end of the matter¹. I can find no case in which the natural man has sued the corporation sole or the corporation sole has sued the natural man.

When a man is executor, administrator, trustee, bailee, or agent, we do not feel it necessary to speak of corporateness or artificial personality, and I fail to see why we should do this when a man is a beneficed clerk. Whatever the Romans may have done—and about this there have been disputes enough—we have made no person of the *hereditas iacens*. On an intestate's death we stopped the gap with no figment, but with a real live bishop, and in later days with the Judge of the Probate Court: English law has liked its persons to be real. Our only excuse for making a fuss over the parson is that, owing to the slow expropriation of the patron, the parson has an estate in church and glebe which refuses to fit into any of the ordinary categories of our real property law; but, as we have already seen, our talk of corporations sole has failed to solve or even to evade the difficulty. No one at the present day would dream of introducing for the first time the scheme of church property law that has come down to us, and I think it not rash to predict that, whether the Church of England remains established or no, churches and glebes will some day find their owners in a corporation aggregate or in many corporations aggregate². Be that as it may, the ecclesiastical corporation sole is no 'juristic person'; he or it is either natural man or juristic abortion.

The worst of his or its doings we have not yet considered. He or it has persuaded us to think clumsy thoughts or to speak clumsy words about King and Commonwealth³.

F. W. MAITLAND.

¹ The matter was well stated by Broke J. in 14 Hen. VIII, f. 30 (Pasch. pl. 8): a parson cannot grant unto or enfeof himself, 'car comment il ad deux respects uncore il est mesme le person.'

² See *Ecc. Com. v. Pinney* [1899] 1 Ch. 99, a case prophetic of the ultimate fate of the glebe.

³ In looking through the Year Books for the corporation sole, I took note of a large number of cases in which this term is not used, but might well have been used had it been current. I thought at one time of printing a list of these cases, but forbear, as it would fill valuable space and only points to a negative result. The discussion of the parson's rights in F. N. B. 109-112 is one of the places to which we naturally turn, but turn in vain.

THE FAULT IN CASES OF COLLISION AT SEA AND THE RESPONSIBILITY OF SHIPOWNERS.

IF the question is put, What is the true rule in regard to any question of maritime right? two answers may be given. It may be said that the rule is the given law soundly interpreted. It may also be said that the rule is that which is laid down by the Courts as being in accordance with the practice of commercial men. We prefer the second answer. Even then the Courts may err in the interpretation of the law, or they may err in its application. They are then liable to criticism, and criticism may induce them to alter their opinion. But so long as they maintain their opinion it must be said that the jurisprudence adopted by the Courts is the law in force, that is to say, the *jus quo utimur*.

Setting out from this view we shall begin by stating what is the rule or law in force in cases of collision at sea, and we shall afterwards examine how this is to be explained.

In cases of collision at sea the Courts seek to ascertain which is the vessel which is to blame. The vessel is considered in this regard almost as if it were a living being. If it cannot be proved that there has been *force majeure*, that is to say, that the collision is the result of an inevitable accident, the ship found in fault is condemned to make good the damage. Generally, if the two ships are in fault, the damage is divided between them, and there is granted to the owners of the cargoes a joint recourse against the two vessels. There are some judicial decisions which prove what we have just advanced.

The Tribunal of Commerce of Havre, by a judgment of March 9, 1885, decided that a steamer under way which collides with a vessel at anchor is *presumed to be in fault*, and ought to be declared responsible for the collision if it is not proved that the collision is due to inevitable accident¹.

In a judgment of the Court of Bordeaux of December 1, 1884, it was decided: 'Even if it is established that at the moment when the captain saw the danger of the collision he seriously tried to carry out the manœuvre prescribed by Articles 18 and 19, it is nevertheless certain that this attempt was useless, either because it had been attempted too late, or because of some inexperience obscure in

¹ Autran, Revue de Droit Maritime, I. p. 133.

*its cause but none the less detrimental in its results, and that in that only appeared the fault of the captain*¹.'

And in a judgment of the Court of Rouen of June 2, 1886²:

'Whereas the initial cause of the collision arose from the fact that the *Pernambuco* instead of steering southward in order to gain sufficient sea room, became entangled with a group of vessels anchored at a distance, which at first appeared sufficient, but which was capable of being suddenly diminished through the influence of the currents which were then in the Tagus (in fact what occurred), whereas taken aslant by one of these currents the *Pernambuco*, which measures 100 metres, was not able to manœuvre sufficiently quickly in order to disengage herself, and came into collision with the *Nile*, which in her turn encountered a contrary current, and whereas the majority of the witnesses of the accident have declared this manœuvre to be imprudent, and whereas the existence of the current at ebb tide during this period is a fact of common knowledge known to all who frequent the port of Lisbon, and confirmed by the pilot of the colliding ship himself, and whereas the latter in effect has declared that by reason of the great quantity of water which was descending the river the currents were very bad at this time, and whereas one cannot seriously contend that for the reparation of the damage resulting from the collision the presence of a pilot on board of the *Pernambuco* took away the civil responsibility of the captain and of the shipowners, and whereas the shipowner in the first place is responsible for the acts of all who are entrusted with the navigation of the vessel, and whereas by a measure of prudence and of policy in the common interest of the ships and of third parties authority invests certain men with the special duty of piloting ships at the entrance of harbours and rivers, these men become *de facto* the servants of the shipowner, so that in accepting the risks of navigation he has accepted in advance the consequences of their acts, and whereas on the other hand the captain of the *Pernambuco* is not on his own side free from fault, seeing that he knew the harbour of Lisbon, where his ship made regular stoppages, that he knew that the tide was ebbing, and that the stream was full, and whereas he saw the pilot steer the ship into the midst of the vessels at anchor instead of inclining southwards where there would have been no obstacle, and whereas in not intervening at this moment he associated himself with a manœuvre essentially dangerous, and made both himself and his owners responsible; for these reasons the judgment appealed from is confirmed.'

By a judgment of the Tribunal of Commerce of Marseilles of December 23, 1887, it is said³: 'Whereas it remains *uncertain* on both sides *whether a mistake has really been committed*, and whereas a *complete uncertainty exists* on the facts of the case, there is ground

¹ Autran, *Revue de Droit Maritime*, II. p. 535.

² Autran, *ibid.* III. p. 287.

³ Autran, *ibid.* III. p. 590-1.

for making the parties concerned both responsible in equal shares for the damages proved.'

A judgment of the Court of Bordeaux of March 23, 1887¹, decides that a collision is only to be regarded as an inevitable accident when following on an event which could not have been either foreseen or avoided.

The Tribunal of Commerce of Marseilles said in a judgment of March 10, 1893², in speaking of a collision—

'Seeing that there is no reason to impute it more to one than the other of the captains, that there are in this collision *uncertainties which cannot be got rid of*, and that in a matter so confused as that of a collision, *the true causes of which cannot be thoroughly understood*, in which the greater part of the facts have been imperfectly comprehended, badly appreciated, wrongly observed by the witnesses themselves, it would not be just to cast upon one of the persons concerned a blame and a responsibility in regard to which *a serious doubt may exist*, considering that there has been in fact a collision, that unfortunately there has been the loss of one of the ships, that since on the one hand the collision was not and could not have been accidental, and that on the other hand it cannot be attributed to the particular fault of one of the captains, it necessarily follows that it comes into the category of those collisions which are doubtful in their cause.'

A judgment of the Tribunal of Commerce of Antwerp of April 13, 1888³, says: 'The vessel under way which collides with another which is at anchor is presumed to be at fault; in order to exonerate himself her captain ought to *prove that he has not committed any fault*, and that the collision is the consequence either of *force majeure* or of a fault on the part of the ship collided with.'

The Court of Appeal of Athens laid down the following rules⁴:—

'The omission of precautions, even precautions more than ordinary, involves the fault of the captain . . . a collision cannot be deemed accidental when it is the consequence of a fault even of the slightest kind . . . the observance of the rules of navigation constitutes a fault when their violation is enjoined by *force majeure* . . . a ship at anchor ought to manœuvre in order to avoid collision.'

In the *Lebanon (owners of) v. Ceto (owners of)*⁵ the House of Lords (overruling the Judge of the Admiralty Court and the Court of Appeal) decided as follows:—

'Two vessels approaching each other in a dense fog without the means of ascertaining the course which either ship is pursuing continue to approach each other, and when one of them which has pursued a correct course finds that the other is pursuing a wrong

¹ Autran, *Revue de Droit Maritime*, III. p. 27.

² Autran, *ibid.* VIII. p. 695.

⁴ Autran, *ibid.* VII. p. 83.

³ Autran, *ibid.* IV. p. 189.

⁵ Judgment of Lord Halsbury, 14 App. Ca. 675.

one which must almost inevitably lead to a collision, she still continues a course which was originally right, but which on these facts it appears to me threw upon her the duty of stopping and reversing, and inasmuch as she did not pursue that course I think she was to blame.'

The theory of negligence in Roman law is that a person is not in fault when he has shown the prudence of *diligens paterfamilias*. 'Ea igitur quae diligens paterfamilias in suis rebus praestare solet a creditore exiguntur¹.'

If one is not able to reproach a person with any negligence the accident is supposed to be casual, even if it had been possible to avoid it by an extraordinary degree of prudence². Fraud is not presumed. Neither fault nor negligence is presumed; they must be proved. And it is not enough to prove that there has been fault or negligence. In order to obtain the condemnation of the defendant it must be proved that to him the fault must be imputed.

How can a person be liable for the faults of other persons? According to the main rule only when he is guilty himself, that is, when he is guilty of *culpa in eligendo*. Jurists of the eighteenth century have on this ground opposed the rule which is now in force. Casaregis decides that the shipowner cannot be made liable for the master's fraud if he had no reason to suppose that the master would act in such a manner³. Bynckershoek agrees with Casaregis, and says that in cases of collision the owner cannot be made liable, because the master was not empowered to run down other ships⁴. In spite of the opposition of those great men, the law of most nations in our time makes the masters responsible for the damage caused by their servants in the course of the business with which they are entrusted (Code Civil, Art. 1384).

It is clear that the principal ought to be condemned only when the servant is proved to be guilty of fault or negligence. If the principal had acted personally he must only be responsible when he has been proved to be guilty. If he must pay for his servant he need pay only if the servant has been in fault.

It is this theory which is said to be followed in cases of col-

¹ Fr. 14 Dig. 13-7. Code Civil, Art. 1383.

² Fr. 11 Dig. 18-6.

³ 'Merito receptum est, quod quotiescumque huiusmodi abfuerit culpa ex eo quod dominus eligerit viros communi existimatione probos et idoneos, toties dominus non tenetur ex delicto praepositi, qui mores mutaverit . . . sufficit in hac etiam (o: exercitoria) dominum in adhibendo et praeponendo diligentiam adhibuisse, quo casu delictum ministri consideratur tanquam casus fortuitus.' Casaregis, Discursus legales de commercio, Disc. cxv, 1740, tom. I, p. 348.

⁴ 'Constat ex facto quidem magistri teneri exercitorem sed non ex alio facto quam cui praepositus sit . . . Omnis praepositio est ex mandato sive expresso sive tacito et si quid delinquit magister dum id mandatum exsequitur, etiam exercitor tenetur. Ei autem mandatum non est aliorum naves dolo vel culpa obruere, quod si fecerit, ipse damnum quod dedit luat, non exercitor.' Bynckershoek, Quaestiones juris privati, lib. IV. c. xxiii.

lision. One first finds, it is said, whether the captain is to blame, and if it is established that he is in fault, from this it follows that the shipowner has to pay. If no fault is established the collision is regarded as accidental.

Judgments can be found which are based on this theory. A judgment of the Tribunal of Commerce of Antwerp of June 26, 1890¹, says: 'It is then necessary to admit that there is doubt as to the causes of the collision, or rather that neither of the captains furnished proof of the mistake which he imputed to his adversary, and that they ought both to be acquitted of the charges brought against them.' As there are many decisions in cases of collision one is able to find several judgments on the lines of that last cited. But the great majority of the judicial decisions are not so. The practice, so far as we can gather it, is illustrated by the judgments which we cited at the beginning. In reviewing them we see that they say that it is necessary to *presume* a mistake, that the owners ought to be responsible if it is *uncertain* whether there was really a mistake, that the captain in order to free himself ought to prove *that he had not been guilty* of a mistake. Ships have been held responsible without there having been negligence. In the matter of the *Ceto* the captain had understood the law as the judges in the Admiralty Court, and in the Appeal Court, and two of the judges of the House of Lords, had understood it. The captain had erred perhaps, but had he committed a fault in regard to which one would ask reparation from him? Would one seek to make a member of the Court of Appeal personally responsible because his decision is overruled by the Supreme Court? The judge of the Court of Appeal however has had plenty of time to consult authorities, to study the matter before coming to a decision, whilst the captain is on the deck, and has, without a moment of reflection being given him, to make an immediate decision in the most difficult circumstances. In rendering the captain thus responsible one throws overboard the theory of mistake, one terms a mistake what is after all an error of judgment of the most excusable character, which the most prudent man might commit. In obliging the captain to pay one commits a manifest injustice. But it will be said one does not ask the captain to pay the damages resulting from the collision. Jurisprudence, *jus quo utimur*, decides that neither the captain nor the pilot should be made to pay the consequences of what we term a fault. It is true, but the reason is because the instinct of justice revolts against the consequences of the theory. According to the theory of the fault it is impossible not to oblige them to pay. We make the shipowner pay, although

¹ Autran, *Revue de Droit Maritime*, VII. p. 585.

he is innocent, because he is presumed to have committed the fault which his servant has in reality committed. How is it possible then to say that the person who has really committed the fault ought not to pay?

M. de Valroger quotes¹ a proposal made in 1867 for the alteration of the French law on this point to the following effect:—

‘Art. 421. If there is a fault committed on the part of the two ships the whole of the damages are added together and are borne by the two ships in the proportion of the seriousness of their faults respectively proved to have contributed to the accident.’

‘Art. 423. The proceedings are brought against the colliding vessel in the person of her captain or of her owners. The captain incurs personal responsibility only if there has been on his part fault or negligence.’

The Congress of Maritime Law at Genoa in 1892² passed the following resolution:—‘Every ship is an assumed person with a responsibility limited to its value.’

The dominant idea which underlies these conclusions is that one is able to make the owners pay and not the captains. The Congress at Genoa arrives at that notion by the fiction that the ship is an implied person.

The project of 1867 said that the captain ought to be responsible only if there is on his part fault or negligence. The framing of this proposal is not one of the most happy; one does not know if the two words ‘fault’ or ‘negligence’ ought to have the same meaning, or if the captain ought to be responsible not only if there is negligence on his part, but also if he has committed a mistake. In this last case the word ‘faute’ or fault ought to signify what we have termed error of judgment, but this last solution appears to us to be inadmissible. It appears certain that the intention of the authors of the project of 1867 has been to transform into law the decisions of practice which tend to make the shipowners responsible in every case, and the captains only if they have neglected their duties.

The inner thought of the theory in regard to collision at sea is that it is necessary to make the shipowners liable, and that one can arrive at this result only by deciding that there is fault, and that the shipowners ought to be responsible for their servants. That it is necessary then to make this responsibility weigh also upon the captains is a great pity, but it is a consequence that one is not able unfortunately to avoid.

What is called fault in regard to collisions at sea is quite another thing than the fault of common law. In practice one investigates the causes

¹ De Valroger, *Droit Maritime*, 1886, V. p. 109.

² Autran, *Revue de Droit Maritime*, VIII. p. 176.

of the collision, and if one is not able to prove that there has been *force majeure*, one has to say that there is a fault and responsibility. If fault were admitted only where there were negligence the captains would be acquitted in the great majority of cases.

'The acquittal of the captain in criminal proceedings against him in consequence of a collision does not present an obstacle to the commercial Courts deciding that the collision is due to the fault of the captain and placing the responsibility for it upon him and upon his shipowners,' said the Tribunal of Commerce of Havre in a judgment dated March 3, 1885¹.

Seeing the immense interests confided to the captains the ship-owners must use the utmost care in their selection, and it is for this reason rare to find cases where the responsibility of the captains arises from the simple negligence which founds their responsibility according to the principles of the common law. It is always, or nearly always, an error of judgment which may occur in the best captain, for the simple reason that men are not infallible.

The theory of the fault is just when the captain is guilty of negligence; the shipowner is obliged to pay, but can indemnify himself through the captain. If there is no fault within the meaning of the common law the shipowner is bound to pay unless an inevitable accident can be proved, and yet he cannot make the captain responsible.

It is necessary to recognize that a person can in some cases without injustice be forced to pay damages, although he may not have been in fault. That happens when the owner of wild beasts has to pay the damage which his animals have occasioned. That is the rule in the English law, in Danish law (Code 6. 10. 4), and in German and French law². Any one who keeps a caravan of wild beasts is said by the English law to do so at his own peril, and will be liable should any damage be done through the escape of a tiger, although he may have taken the greatest possible care to prevent the mischief³. The Danish law provides that if wild beasts do mischief the owner and the person in whose possession they are are obliged to pay as if they personally had done the mischief. It matters little that the possessor may have used the greatest precautions; he must pay, and that because the possession of wild beasts is of no value to human society. It is otherwise with maritime industry; it is useful and even indispensable. But there is another consideration which presents itself: *ex qua persona quis lucrum capit ejus factum praeestare debet*⁴. The shipowner who

¹ Autran, *Revue de Droit Maritime*, I. p. 133.

² Code Civil, Art. 1385. Unger, *Handeln auf eigene Gefahr*, 2nd edition, p. 70.

³ Holland, *Jurisprudence*, 5th edition, p. 149.

⁴ P. 149. *Digest* (30-17).

profits from his industry ought to bear the risks in so far as the laws consider necessary in order to protect the security of navigation.

The interests confided to the captain of a ship are immense. Not only enormous values, but the lives of men are at stake. Thus one ought to exact from him the greatest precautions; his negligence, even the slightest, is punished. But that is not enough; it is necessary to interest the shipowners in order to select captains and crew carefully. Unless *force majeure* can be proved the shipowner is made liable not only for the fault but also for the error of judgment of the captain. The rule *casum sentit dominus* means only that the owner of a thing ought to bear the loss unless there is any reason to make another bear it; it is simply negative. When a collision has taken place, and the manoeuvre of one of the vessels is in no respect to blame, while the captain of the other vessel has been guilty of a mistake, it is not contrary to justice to make the owner of the latter vessel bear the damage. It is with good reason, we consider, that the Belgian Association for the Unification of Maritime Law has passed the following resolution: 'The owner of a ship is civilly responsible for the *acts* (not only the faults) of the captain.' One says in practice that the ship (not the captain) is to blame and ought to bear the damage.

One can say that shipowners are by law forcibly rendered insurers of the damage which their industry may cause other people. The shipowner who has paid can recover his loss from his captain, but only if the captain is guilty of fault or negligence; the captain has not the profit of the navigation, and ought not to bear its risks. One finds some analogy in Art. 1733 of the Civil Code on the subject of hirer's risk. According to the terms of this article the hirer 'is responsible for loss through fire unless he is able to prove that the fire occurred by accident or by *force majeure*.' In the same order of ideas the person who constructs or maintains a railway is answerable for the damage which results from the working. Whoever works a railway takes upon himself the liability of the undertaker¹.

In the case of collision at sea the owner of the ship colliding is made liable not only for the damage to the ship collided with, but also for that which is caused not only to the cargo which it is chartered to transport, but also to that which the collided ship was transporting. The practice is universal to grant such a claim, and we sup-

¹ The undertaker answers for all the accidents of the undertaking which arise from the fault of the undertaking. Unger, *Handeln auf eigene Gefahr*, p. 87. The undertaker ought in principle to answer for damage which is not imputable to him personally. Unger, *ibid.* p. 90.

pose that there is no one who would advocate a contrary rule. It is necessary, however, to recollect that the ship collided with and its cargo have not, according to the common law, the right of being indemnified by the owner of the colliding ship. The principal rule is that one ought only to pay the damage if one is in fault. The owner of the ship colliding is however perfectly innocent. He has committed no fault ; in selecting he has chosen the best captain, he has chosen him from amongst the persons named by the State as capable. He is innocent even in the case where the captain is in fault.

How is it possible to maintain that the ship collided with and its cargo have, according to the principles of the common law, the right of being indemnified by the owner of the colliding ship? The owner of the ship collided with and the owner of the cargo have exposed their belongings to the risks of navigation, and can insure themselves against those risks. Also, it seems to us there is no reason to assert in principle that they have the right of demanding reparation from a person perfectly innocent. In granting them such a claim the law grants them an advantage to which they have no natural right. It follows from that that one does not do them any wrong in limiting the liability of the owner of the ship collided with, nor even in refusing all recourse against the owner of the ship colliding which founders in consequence of the collision.

We have noted that it is not customary to make the captain pay in case of a collision at sea. However, we do not very well understand how it is possible to acquit him if one bases it on the theory of the fault. Danish legislation, which has also a provision admitting the responsibility of the principal for the faults of his servants, adds that the principal can indemnify himself as against the agent¹. How is it possible to come to any other conclusion? Would it ever be possible to condemn the innocent person because he is assumed to have committed the fault attributed to his agent, and to acquit the person who has in reality committed it?

The Courts have had to concern themselves with this question in the following case. The German ship *Thuringia* had entered the port of Curaçao, and the captain had left the conduct of the vessel to the pilot, whose presence on board was compulsory. The *Thuringia* collided with and ran down the ship *Mediator*, the owner of which demanded reparation for the damage. Several law suits were the consequence. In several judgments one finds that the liability of the captain was not taken away by the fact of the presence of a pilot on board, because in spite of that the captain retains the command of the ship. The aforesaid judgment of the

¹ Code 3. 19. 2. [By the Common Law the person actually in fault is always liable. But it is almost always more profitable to sue the principal.—Ed.]

Court of Rouen of June 2, 1886, said that the captain should have opposed the wrong manœuvre of the pilot, and that in making no observation he associated himself with a manœuvre essentially dangerous, and in so doing he incurred liability for himself and at the same time for his shipowners.

The Reichsgericht adjudged on the contrary in a proceeding against the captain of the *Thuringia* by a judgment of July 12, 1886¹, that one 'ought not to blame the captain of the *Thuringia* for not having given directions for slackening the speed, which he came to the conclusion was dangerous. He had not to intervene in a manœuvre by the compulsory pilot. It was a heavy responsibility which he could not be called upon to assume.'

The Tribunal of Commerce of the Seine has had to decide on the same question. Some underwriters representing the interests of the *Mediator* brought an action against the captain and the owners jointly. In the judgment of March 26, 1887², one reads: 'It appears from the documents that it is compulsory for foreign ships entering the port of Curaçao to take on board a pilot to navigate the vessel. . . . that the captain had ceased to have control of the ship by reason of the presence on board of the ship of the pilot of the port, and that further no fault could be charged against him.' It was therefore held that he could not be considered personally responsible for the collision which occurred under the control of the pilot who had been forced upon him, and that in consequence the claim put forward by the underwriters against him on account of the loss arising from the collision ought to be rejected.

So far as concerned the Hamburg Company the judgment proceeds:—

'Seeing that the Hamburg Company is the owner of the ship *Thuringia* which collided with and run down the ship *Mediator* in the harbour of Curaçao on July 7, 1884, that contrary to the contentions of that company the presence on board of a pilot imposed by the laws which regulated the entry of ships into the port of Curaçao could not exonerate it from the liability for a loss caused by the collision of the ship belonging to it. . . . that by the application of the principles of the common law it had to make reparation for the damage.'

On these grounds it was declared that the underwriters were not warranted in their claim against the captain, but the Hamburg-American Company was condemned in damages in favour of the underwriters.

Mr. Alfred de Courcy speaks of this judgment in an essay entitled

¹ Autran, *Revue de Droit Maritime*, II. p. 716.

² Autran, *ibid.* III. p. 35.

'Two Attempts at Revolution in Jurisprudence'¹, and says that it overthrows jurisprudence in order to be consistent with justice.

We think that the solution sanctioned by the Tribunal of the Seine is in conformity with the *jus quo utimur*, especially if one observes that Courts have very seldom to decide in proceedings against captains, because public opinion is opposed to such actions.

It is true, however, that one is able to find judgments which declare captains responsible, but they are rare. Captain Chantreau was part owner of a vessel which he commanded. Following upon a collision he sued for payment of his insurance, but the Tribunal of Commerce of Marseilles adjudged on July 27, 1888²—

'That the accident not being able to be attributed to *force majeure*, and not being able to be considered of doubtful origin because one of the ships was anchored and immoveable, and in such a position that it could not be manœuvred, the accident must of necessity be taken to have arisen from a fault and an error on the part of Captain Chantreau; that under these circumstances the company from which he claims payment of the insurance, being in a way able thus to prove the fault of the captain, should not be held responsible to him for the amount of the insurance so far as his share of the ownership of the lost vessel was concerned.'

We think that this case was wrongly decided if the captain was not guilty, except of a mere error of judgment. What does it matter to the assurers whether the captain or any one else happens to be the owner of the vessel? If the owner had not been the captain the assurance company would have been condemned.

A similar case happened at Gothenburg in Sweden. It was clear that the collision was owing to the fault of the seaman who was on watch. This seaman was part owner of the vessel. The company, desirous of taking advantage of this circumstance, refused to pay. This produced so much indignation at Gothenburg that the merchants of the town made themselves responsible for the payment of the insurance.

It is impossible, as we think, to arrive at the liability of the owner by putting into force the rule that he ought to be responsible for his servants.

Can the captain be said to be the servant of the shipowner when the shipowner charts his ship to another who has himself chosen the captain? Can the captain be said to be the servant of the owner when he has been nominated by the consul in the absence of the owner? Is it possible to say that compulsory pilots 'become *de facto* the servants of the shipowner,' according to the before-mentioned judgment of the Court of Rouen of June 2, 1886? Such a thing is a pure fiction, but the fiction is only the

¹ Autran, *Revue de Droit Maritime*, III. p. 110.
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² Autran, *ibid.* IV. p. 439.

confession the doctrine has to make of its own inability to explain the juridical facts which result. One is able to explain everything by fiction, in other words it explains nothing.

It is impossible to maintain that the compulsory pilot is the servant of the shipowner. A judgment of the Tribunal of Rotterdam of December 1, 1883¹, condemning the captain of the ship in spite of the fact that he had on board a compulsory pilot, has in our view placed its decision upon wrong grounds in deciding that the pilot was only a guide. This same judgment decided that the pilot had incurred no civil responsibility, but was amenable only to the penalties prescribed by the regulations. This last point will be approved by everybody, but the pilot ought to have been acquitted because he was undoubtedly guilty only of an error of judgment.

In criminal law the distinction between grave fault and slight fault is of the utmost importance; it is not so in civil law. He who has committed a slight fault will be made answerable for the whole damage. He would not be more liable if he had committed a grave fault. If two persons are found guilty of fault they are jointly responsible for the whole of the damage without there being any occasion to inquire which of the two is guilty of the grave fault or of the slight fault. This result, although inevitable according to the theory of the fault, is perhaps repugnant to common sense, especially if there is on one side not even a slight fault, but only an error of judgment. It is apparently in such cases that the English judges have said that with regret they must find the other vessel also to blame. It seems to be the general wish that the damage should be divided between ships in proportion to the gravity of their faults. We are perfectly in agreement with this view—only this conclusion cannot be deduced from the rules which govern the theory of the fault.

Ought this principle of proportionate contribution to be extended to the owners of cargoes? It has been said that when the proportion between the faults of the ships has been ascertained, the two ships ought to be responsible jointly to the owners of cargoes in this same proportion. We are still absolutely agreed. But the question arises, Why should the owner of one of the ships be ruined for the advantage of the owner of the cargo, or rather for the advantage of his assurers? According to the present theory of the fault we do not know how we can escape from this result. Accepting our view there would be no difficulty. The owner of the cargo has no right according to natural justice to any reparation. The right which is granted to him is an advantage to him,

¹ Autran, *Revue de Droit Maritime*, I. p. 257.

utilitatis causa introductum. It follows from this that one is able to limit it, and that it is necessary to limit it. The responsibility of the owner is founded on the necessity to secure navigation, but it is unjust to extend this liability beyond that limit.

The view that a liability imposed by law, *utilitatis causa*, should be limited by law to the extent necessary to prevent the burden of the liability being unjust may be illustrated by reference to the English law relating to innkeepers. For the sake of the preservation of the goods of travellers the common law made the innkeeper liable for the negligence or default by himself or his servants in keeping the goods of the guest. The loss of the goods was presumptive evidence of such negligence, which it was for the innkeeper to rebut by showing that the loss happened by the negligence of the guest or by *force majeure*. The law implied a promise on the part of the innkeeper to take care of the goods of his guest according to his common law duty. By the 26 & 27 Vict. c. 41 it was provided that if the innkeeper complied with certain statutory formalities his liability would be limited to the sum of £30, unless the loss occurred through the wilful act, default, or neglect of the innkeeper or of his servant, or unless the goods were expressly deposited with the innkeeper for safety.

One asks oneself if in cases of collision the whole damage should be paid. The International Committee of Maritime Law has put this question:—‘Ought damages awarded in cases of collision at sea to constitute a complete reparation for the injury done?’ The majority of the answers were in the affirmative. However, the English Committee answered, ‘Yes, in principle’; and the Committee of the Netherlands, ‘Yes. There exists no sufficient reason to confine reparation for damage done to that directly caused to the body of the ship as it has sometimes been laid down by the jurisprudence of the Netherlands.’

The Tribunal of Commerce of Marseilles in a judgment of August 1, 1888¹, decided that the breaking of the affreightment resulting from collision is a loss indirectly occasioned for which the ship colliding is not answerable. The Danish Courts grant in cases of collision reparation of the damage caused to the body of the ship, and also loss through demurrage: the latter is ascertained according to the rules of Danish law without regard to what has been agreed in the charter party.

We see that in the jurisprudence of some countries one does not grant total reparation for damage done. Is there any reason to complain of this jurisprudence, and to wish that it should be modified? We do not think so, and that for the reason which we

¹ Autran, *Revue de Droit Maritime*, IV. p. 309.

have indicated. M. Unger says that from the moment when the shipowner is obliged to pay damage which it is impossible to regard him as being personally responsible for, it is but just to place a limit upon his liability¹.

It may be objected against us that all the decisions rest upon the theory of the fault, and that it is absurd to wish to abolish it with a stroke of the pen. Those who so object will be wrong. That the actual practice has been developed upon the lines of the theory of the fault may well be, but that does not matter; the theory of the fault has become transformed into customary right, the *jus quo utimur* is only the collection of judicial decisions. If we can deduce from these decisions that they make the owners pay in cases of collision, but that they refuse to make captains and pilots pay, we cannot (although it has been sought to be said) maintain that they rest on the theory of the fault. In speaking thus we are not seeking to alter; we take the practice as we find it, and we seek to explain it to the best of our capacity.

A. HINDENBURG.

¹ Handeln auf eigene Gefahr, p. 95.

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THE FORMS OF POLITICAL UNION.

IN a well-known passage in the *Essay on the Human Understanding*, Locke, in a mood of despondency, observes that if one 'shall well consider the errors and obscurity, the mistakes and confusion that are spread in the world by an ill-use of words, he will find some reason to doubt whether language, as it hath been employed, has contributed more to the improvement or hindrance of knowledge among mankind.' The student of politics feels the hindrance more than any other searcher after knowledge; for it is his to work with the materials furnished, often unconsciously, by those who are little given to an exact use of terms. In England it might have been expected that the close relation of law and politics would have helped us to an exact use of political terms; it has instead given us a legal language which is principally famous for its inexactness, its want of settled technical terms. The study of Jurisprudence has done little to supply the defect; it has in fact never recovered from a bad start. Bentham's terms were generally too clumsy and often too fanciful for common use; Austin has repelled the generation which followed him by his attempt to force common language into a single and sometimes unfamiliar meaning.

There are no political terms which are less susceptible of exact definition, or even of formal analysis, than those which are used of the different forms of political organization. The term 'State' itself, which as 'status' and 'estate' has done duty in the law of personal conditions, and in the law of property, is amongst jurists and publicists the accepted term for the 'independent political society,' and has been broken in to describe a subordinate government in a certain mode of organization, so that the writers on the American Constitution are driven to distinguish the two meanings of the term by the use of a small or a capital S. The distinguished author of *Political Science and Constitutional Law*, indeed, meets the difficulty by doing some violence to the formal terms of American law, for he uses 'state' to describe the sovereign organism, and in the teeth of the Constitution, drops the 'State' and uniformly speaks of the subordinate government as 'the Commonwealth.' But this use of 'State' and 'Commonwealth' is inverted in the Australian Constitution, and in that, the latest of Constitutions, 'Commonwealth' is used to describe an organism,

which, though not sovereign, corresponds in everything but its subordination to the Imperial Parliament with the United States, and while the 'State' is, as in America, the subordinate constituent, an attentive reading of the Commonwealth of Australia Act will show that even there 'Commonwealth' has more than one meaning. Sometimes it is the political organism established by the Act; sometimes it is the territorial limits of that political society, often it is the central government of that society or some appropriate organ thereof. In the confusion of meanings which attach to political terms, it is important to ascertain the sense in which on a particular occasion, or in a particular connexion, a particular term is used; and it is above all things important not to dogmatize about essentials if we would not lose touch with the actual facts of the institutions of the nations.

Permanent political unions are commonly classed as *Confederation*, *Incorporation* (or *Consolidation*), and *Federation*. The nature of Confederation as a type of political union is simple, though the name is not unfrequently applied to organizations which in fact belong to one of the other classes, as when we speak of the Confederation of Canada, or the Confederacy of the Swiss Republic. It is an alliance of states in which the central power represents only the governments of the several members of the union; its powers consist simply in issuing requisitions to the state governments, which, when within the limits of the federal authority, it is the duty of those governments to carry out. The purposes for which requisitions may be made are those which the parties have submitted to the 'federal power'; they may be few or many, and might conceivably extend to everything upon which sovereign power can operate. But so slight a tie will not bear the pressure of many or indefinite requisitions. Defence against external aggression, probably the conduct of foreign affairs, and the determination of disputes between the States, which, by disturbing internal tranquillity, expose the Confederacy to the danger of attack from without; these are the objects to which a system of confederate states is likely to be confined. But 'confederate' elements may be found even in the closer unions. In the German Empire, which perhaps from its monarchic government and the mode of its establishment as much as from the scope of the central authority, is often regarded as a consolidation rather than a federation, the Bundesrath—an upper chamber which overshadows the lower—is distinctly confederate. Its constitution might easily mislead us as to its character. The States are unequally represented; their membership roughly corresponds with their population and importance; it therefore suggests a national democratic

organization. But its true nature is thus accurately described by Mr. Lawrence Lowell:

'It is not an international conference, because it is part of a constitutional system, and has power to enact laws. On the other hand, it is not a deliberative assembly because the delegates vote according to instructions from home. It is unlike any other legislative chamber, inasmuch as the members do not enjoy a fixed tenure of office, and are not free to vote according to their personal convictions. Its essential characteristics are that it represents the governments of the States and not their people, and that each State is entitled to a certain number of votes which it may authorize one or more persons to cast in its name, those persons being its agents whom it may appoint, recall, or instruct at any time. The true conception of the Bundesrath, therefore, is that of an assembly of the sovereigns of the States, who are not indeed actually present but appear in the persons of their representatives¹.'

Incorporation differs from Confederation in that it substitutes a new state for several states, in every case at any rate where the incorporation does not consist merely in the absorption by one state of part of another state. The state possesses a government which may or may not be sovereign, but which, in one form or another, pervades the whole territory of the state, and is capable of affecting all its subjects. If there be governments of parts of the state—what are called local governments—they will commonly (but not necessarily) derive their existence and authority from the central government, and in any case they will be subject to its regulation and will rely upon its organs for their support. Complete unification would seem to imply such a homogeneity of the institutions of the state as would remove all the marks of the former separateness of the component parts. But such a unification would hardly contribute to the stability and durability of the state, and the new state will act wisely to seek and retain the ancient landmarks. In practice, consolidation does not in fact obliterate the original lines of division; and the retention of these lines furnishes what are called the federal elements of an incorporated union. From one point of view the United Kingdom of Great Britain and Ireland is a perfect incorporation or consolidation, as it is one state, whose government—the Imperial Parliament—unlimited in scope, supreme in authority, and unitary in action, is rightly regarded as a type of sovereignty in its simplest and most direct form. But the constitution of both Houses of Parliament, and the separate administrative and jural systems, are the legal recognition of the Three Kingdoms as separate units, and are the federal elements in the union. To say that these 'federal

¹ Lowell, *Governments and Parties in Continental Europe*, vol. i. pp. 264-5.

elements' exist by virtue of the law, and therefore by sufferance of the state, is to say no more than may be said of every part of every federation. The popular description, 'legislative union,' expresses the condition of the United Kingdom better than any term which can be applied to it.

Federal union differs from Confederation in this—that it creates a new political organism: a state possessing all the attributes of sovereignty. It is universal in scope, exclusive of every other Power, and of necessity supreme over and acting upon all persons and things within its territory. To distinguish the 'federal state' from the 'unitary state' is a much more difficult task. The distinction lies not in the nature of the state itself, but in the organization of government. In every 'federal state' the government consists of central and local parts, neither owing its existence to the other nor capable of destruction by the other. The central government, in matters within its sphere, extends over the whole territory and population of the state; the local government is restricted in area. But while this may be said of every state called federal, the same may be said of states regarded as unitary, where local institutions are directly established by the Constitution. Seeley¹ denies altogether that there is any fundamental difference between the unitary and the federal state, and adopts those terms merely as 'marking conveniently a great difference which may exist between states in respect of the importance of local government.' Even the preponderance of the local government, which Seeley regards as the mark of the federal state, can hardly be regarded as essential. In Canada, the residuary power of government lies in the central and not in the provincial power; and the control which the Dominion Government may exercise over the provincial in every department warns us that the doctrine of the independence of the governments in their respective spheres must not be pushed too far. Neither in the United States nor in Germany can we truly speak of the preponderance of local government. On the whole we must be content with some vague description, as that the independence of the local government surpasses anything which can fairly come under the head of municipal freedom²; or we may adapt Lewis's³ description of a subordinate government, as one which possesses powers and institutions applicable to every purpose of government, and which would thus be capable of governing the district subject to it, if the supreme government were altogether withdrawn.

¹ Seeley, *Political Science*, pp. 95, 100.

² Freeman, *History of Federal Government* (2nd ed.), p. 2.

³ Lewis, *Government of Dependencies* (ed. Lucas), pp. 72, 73.

To say no more than this is to describe very imperfectly any federal union that now exists or has ever existed. But the organisms which go by the name of Federations present so great a diversity that beyond the characteristics named there is hardly anything that may be deemed essential save agreement. In general the new state has been formed by the coalescence of several states, which preserve their existence as units and maintain a large part of their previous organization and functions as the 'local part' of the government of the new state, and as units are the basis of the organization of the central government. This, with the fact that the functions they discharge are not enumerated while those of the central government are, gives them the appearance of an independent existence which leads to such statements as that there is 'a residuary sovereignty in the State' (meaning the component state), that a federation is a 'union of sovereign states,' and that a federal state differs from other states by the fact that it is one state and several states. In a complex political organism, where law and politics are necessarily entwined, the importance of a clear appreciation of these matters cannot be overrated. 'It requires patient and successful discrimination to attain a point of view from which it is clearly seen that there can be no such thing as residuary sovereignty; that sovereignty is entire or not at all; and that what is left by the state to the local organizations, in this manner of distribution, is only the residuary powers of government¹.'

But the coalition of separate states is not the only way in which a federal state may be established. The experience of the Dominion of Canada has disproved the doctrine of Freeman, that 'a Federal Union, to be of any value, must arise by the establishment of a closer tie between elements which were before distinct, not by the division of members which have been hitherto more closely united².' Without going so far as Mr. Goldwin Smith, who speaks of that union as the creature of deadlock³, we must recognize that the immediate occasion of the accession of Upper and Lower Canada to the Confederation proposed by the Maritime Provinces was the perception of the leading men of both parties, that Confederation offered an escape from the embarrassment of a legislative union which had proved too close a tie. The very general interest in federation at the present day is due to the belief that it offers an escape from the dangers of over-centralization in large States.

The complete and separate equipment of the central and local

¹ Burgess, *Political Science and Constitutional Law*, vol. ii. p. 7.

² Freeman, *History of Federal Government* (2nd ed.), p. 70.

³ Canada and the Canadian Question, p. 143.

governments for the discharge of the three governmental functions—legislative, executive, and judicial—might well be considered essential to the federal form. But a rigid adherence to this test would raise the question of the federal character of the German Empire, where executive power practically rests on the arm of Prussia, and where as to judicial power the organization of the Courts of the States is controlled by imperial legislation. In Canada, the judges of the provincial courts are appointed, paid, and—should the occasion arise—removed by the Dominion Government.

The division of powers in a Federal State between central and local organs implies some machinery for confining each to its sphere. But no one method for enforcing those limitations can be deemed essential. The power of the Courts, as an incident of ordinary judicial duties, to interpret the Constitution, and prevent the other organs from exceeding their powers, belongs fundamentally neither to a written constitution nor to federation, for both may and do exist without it. It is in some respects even the contradictory of federation and its separation of powers. Its origin is in the unity and universality of the English Common Law, and the jealousy of the Common Law Courts. For the source of what has been to so many Englishmen the mystical power of the Supreme Court of the United States, we must look rather to the conflicts of Coke and Bacon than to the letter of the constitution of the United States.

If there be no essential difference in the scope even of a Confederation and an Incorporation, if the former may embrace every subject over which governmental power can be exercised, we are not likely to find the true test of federalism in the purposes of the union. So great an authority as Freeman, however, has said, 'The true and perfect Federal Commonwealth is any collection of States in which it is equally unlawful for the Central Power to interfere with the purely internal legislation of the several members, and for the several members to enter into any diplomatic relations with other powers¹.' This may describe, with some approach to accuracy, the principle of the United States Constitution; but in neither of these elements does it truly describe the Constitution of the German Empire, and it is wholly inapplicable to such unions of dependent communities as constitute the Dominion of Canada and the Commonwealth of Australia. 'All must be subject to a common power in matters which concern the whole body of members collectively²' still leaves the question—What are such common matters? The

¹ Freeman, *History of Federal Government*, p. 8.

² *Ib.* p. 2.

answer can only be, those which the parties have declared to be common.

Comparing the existing political unions with the three types, we find that no actual union does more than approximate to a type, and that it must be placed in one class or another according to the preponderance of one or the other elements in it. The Confederacy of the United States did not operate wholly upon governments; the government of the present union contains elements national, federal, and confederate. As has been pointed out, the German Empire is sometimes regarded as a unitary state, sometimes as federal, but it contains at any rate one mark of confederation. The incorporate union of Great Britain and Ireland has federal features in its government; and the 'confederation' of Canada produced an organism without confederacy, and with a government which in many of the matters commonly associated with the federal form, exhibits the marks of the unitary rather than the federal government. . In the formation of every political organism the only rule can be political expediency.

W. HARRISON MOORE.

THE THEORY OF JUDICIAL PRECEDENTS.

THE importance of judicial precedents has always been a distinguishing characteristic of English law. The great body of the common or unwritten law is almost entirely the product of decided cases, accumulated in an immense series of reports extending backwards with scarcely a break to the reign of Edward I at the close of the thirteenth century. Orthodox legal theory indeed long professed to regard the common law as customary law, and the reported precedents as merely evidence of the customs and of the law derived therefrom. But this was never much better than an admitted fiction. In practice, if not in theory, the common law of England has been manufactured by the decisions of English judges. Neither Roman law, however, nor any of those modern systems which are founded upon it, allows any such place or authority to precedent. They allow to it no further or other influence than that which is possessed by any other expression of expert legal opinion. A book of reports and a text-book are on the same level. They are both evidences of the law; they are both instruments for the persuasion of judges; but neither of them is anything more¹. English law, on the other hand, draws a sharp distinction between them. A judicial precedent speaks in England with a voice of authority; it is not merely evidence of the law but a source of it; and the courts are bound to follow the law that is so established.

It seems clear that we must attribute this feature of English law to the peculiarly powerful and authoritative position which has been at all times occupied by English judges. From the earliest times the judges of the king's courts have been a small and compact body of legal experts. They have worked together in harmony, imposing their own views of law and justice upon the whole realm, and establishing thereby a single homogeneous system of common law. Of this system they were the creators and authoritative interpreters. They did their work with little interference either from local custom or from legislation. The centralization and concentration of the administration of justice in the royal courts gave to the royal judges a power and prestige which would have been unattainable on any other system. The authority of precedents

¹ [This is so. But in point of fact the importance of reported decisions has been on the increase in both France and Germany for some time.—Ed.]

was great in England because of the power, the skill, and the professional reputation of the judges who made them. In England the bench has always given law to the bar; in Rome it was the other way about, for in Rome there was no corporate body of professional judges capable of doing the work that has been done for centuries in England by the royal courts.

Declaratory and creative precedents.—In proceeding to consider the various kinds of precedents and the methods of their operation, we have in the first place to distinguish between those decisions which are creative of the law and those which are merely declaratory of it. A declaratory precedent is one which is merely the application of an already existing rule of law. A creative precedent is one which creates and applies a new rule. In the former case the rule is applied because it is already law; in the latter case it is law for the future because it is now applied. In any well developed system such as that of modern England, declaratory precedents are far more numerous than those of the other class; for on most points the law is already settled, and judicial decisions are therefore commonly mere declarations of pre-existing principles. Creative precedents, however, though fewer in number, are greater in importance. For they alone develop the law; the others leave it as it was, and their only use is to serve as good evidence of it for the future. Unless required for this purpose, a merely declaratory decision is not perpetuated as an authority in the Law Reports. When the law is already sufficiently well evidenced, as when it is embodied in a statute or set forth with fullness and clearness in some comparatively modern case, the reporting of declaratory decisions is merely a needless addition to the great bulk of our case law.

It must be understood, however, that a declaratory precedent is just as truly a source of law as is one belonging to the other class. The legal authority of each is exactly the same. Speaking generally, the authority and legal validity of a precedent do not depend on whether it is, or is not, an accurate statement of previously existing law. Whether it is or is not, it may establish as law for the future that which it now declares and applies as law. The distinction between the two kinds turns solely on their relation to the law of the past, and not at all on their relation to that of the future. A declaratory precedent, like a declaratory statute, is a source of law, though it is not a source of *new* law. Here, as elsewhere, the mere fact that two sources overlap, and that the same legal principle is established by both of them, does not deprive either of them of its true nature as a legal source. Each remains an independent and self-sufficient basis of the rule.

I have already referred to the old theory that the common law is customary, not case law. This theory may be expressed by saying that according to it all precedents are declaratory merely, and that their creative operation is not recognized by the law of England. Thus Hale says in his *History of the Common Law* :—

‘It is true the decisions of courts of justice, though by virtue of the laws of this realm they do bind as a law between the parties thereto, as to the particular case in question, till reversed by error or attain, yet they do not make a law properly so called: for that only the king and parliament can do; yet they have a great weight and authority in expounding, declaring and publishing what the law of this kingdom is; especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times¹.’

Hale, however, is evidently troubled in mind as to the true position of precedent, and as to the sufficiency of the declaratory theory thus set forth by him, for elsewhere he tells us inconsistently that there are three sources of English law, namely, (1) custom, (2) the authority of parliament, and (3) ‘the judicial decisions of courts of justice consonant to one another in the series and succession of time².’

In the Court of Chancery this declaratory theory never prevailed, nor indeed could it, having regard to the known history of the system of equity administered by that court. There could be no pretence that the principles of equity were founded either in custom or legislation. It was a perfectly obvious fact that they had their origin in judicial decisions. The judgments of each Chancellor made the law for himself and his successors.

‘It must not be forgotten,’ says Sir George Jessel, ‘that the rules of courts of equity are not, like the rules of the common law, supposed to have been established from time immemorial. It is perfectly well known that they have been established from time to time—altered, improved, and refined from time to time. In many cases we know the names of the Chancellors who invented them. No doubt they were invented for the purpose of securing the better administration of justice, but still they were invented³.’

But both at law and in equity this declaratory theory must be totally rejected if we are to attain to any sound analysis and explanation of the true operation of judicial decisions. We must admit openly that precedents make law as well as declare it. We must admit further that this effect is not merely accidental and indirect, the result of judicial error in the interpretation and autho-

¹ Hale's *History of the Common Law*, p. 89 (ed. of 1820).

² *Ibid.* p. 88.

³ *In re Hallett*, 13 Ch. D. at p. 710.

ritative declaration of the law. Doubtless judges have many times altered the law while endeavouring in good faith to declare it. But we must recognize a distinct law-creating power vested in them and openly and lawfully exercised. While it is quite true that the duty of the courts is in general *jus dicere* and not *jus dare*, nevertheless they do in fact and in law possess both these functions. Creative precedents are the outcome of the intentional exercise by the courts of their privilege of developing the law at the same time that they administer it.

Authoritative and persuasive precedents.—Decisions are further divisible into two classes, which may be distinguished as authoritative and persuasive. These two differ in respect of the kind of influence which they exercise upon the future course of the administration of justice. An authoritative precedent is one which judges must follow whether they approve of it or not. It is binding upon them and excludes their judicial discretion for the future. A persuasive precedent is one which the judges are under no obligation to follow, but which they will take into consideration, and to which they will attach such weight as it seems to them to deserve. It depends for its influence upon its own merits, not upon any legal claim which it has to recognition. In other words, authoritative precedents are *legal* sources of law, while persuasive precedents are merely *historical*. That is to say, the former establish law in pursuance of a definite rule of law which confers upon them that effect. The latter, if they succeed in establishing law at all, do so indirectly, through serving as the historical ground of some later authoritative precedent. In themselves they possess no legal authority.

The authoritative precedents recognized by English law are the decisions of the superior courts of justice in England. The chief classes of persuasive precedents are the following :

- (1) Foreign decisions, and notably those of American courts¹.
- (2) The decisions of superior courts in other portions of the British Empire, for example, the Irish courts. 'Decisions of the Irish courts, though entitled to the highest respect, are not binding on English judges².'
- (3) The decisions of the Privy Council when sitting as the final Court of Appeal from the colonies. In *Leask v. Scott*³ it is said by the Court of Appeal, speaking of such a decision in the Privy Council : 'We are not bound by its authority, but we need hardly say that we should treat any decision of that tribunal with the greatest respect, and rejoice if we could agree with it.'

¹ *Castro v. R.*, 6 App. Cas. 249.

² *In re Parsons*, 45 Ch. D. 62.

³ 2 Q. B. D. 376, at p. 380.

(4) Judicial *dicta*, that is to say, decisions which go beyond the occasion, and lay down a rule wider than is necessary for the purpose in hand. We shall see later on that the authoritative influence of precedents does not extend to such *obiter dicta*, but they are not equally destitute of persuasive efficacy¹.

Absolutely and conditionally authoritative precedents.—Authoritative precedents are of two kinds, for their authority is either absolute or conditional. In the former case the decision is absolutely binding and must be followed without question, howsoever unreasonable or erroneous it may be considered to be. It has a legal claim to implicit and unquestioning obedience. Where, on the other hand, a precedent possesses merely conditional authority, the courts possess a certain limited power of disregarding it. In all ordinary cases it is binding, but there is one special case in which its authority may be lawfully denied. A precedent belonging to this class may be overruled or dissented from, when it is not merely wrong, but so clearly and seriously wrong that its reversal is demanded by the interests of the sound administration of justice. Where this is not so, the precedent must be followed, even though the court which follows it is persuaded that it is erroneous or unreasonable. The full significance of this rule will require further consideration shortly. In the meantime it is necessary to state what classes of decisions are recognized by English law as absolutely, and what as merely conditionally, authoritative.

Absolute authority is attributed to the following kinds:—

(1) Every court is absolutely bound by the decisions of all courts superior to itself. A court of first instance cannot question a decision of the Court of Appeal, nor can the Court of Appeal refuse to follow the judgments of the House of Lords.

(2) The House of Lords is absolutely bound by its own decisions. 'A decision of this House once given upon a point of law is conclusive upon this House afterwards, and it is impossible to raise that question again as if it was *res integra* and could be re-argued, and so the House be asked to reverse its own decisions².'

(3) The Court of Appeal is, it would seem, absolutely bound by its own decisions and by those of older courts of co-ordinate authority, for example, the Court of Exchequer Chamber³.

In all other cases save these three, it would seem that the authority of precedents is merely conditional. That is to say, in

¹ Persuasive efficacy, similar in kind though much less in degree, is attributed by our courts to the civil law and to the opinions of the commentators upon it; also to English and American text-books of the better sort.

² *London Street Tramways Company v. London County Council* [1898] A. C. 375, at p. 379.

³ *Pledge v. Carr* [1895] 1 Ch. 51; *Lay v. London County Council* [1895] 2 Q. B. at p. 581, per Lindley L.J.

all other cases a court is only conditionally bound by its own decisions, by the decisions of inferior, and by those of co-ordinate courts. It will be seen from these rules that the authority of a precedent depends not merely on the court from which it proceeds, but also on the court in which it is cited. Its authority may be absolute in one court, and merely conditional in another. A decision of the Court of Appeal is absolutely binding on a court of first instance, but is only conditionally binding upon the House of Lords.

In order that a court may be justified in disregarding a conditionally authoritative precedent, two conditions must be fulfilled. In the first place, the decision must in the opinion of the court in which it is cited be a *wrong* decision. A decision is wrong in two cases: first when it is contrary to law, and secondly when it is contrary to reason. It is wrong as contrary to law, when there is already in existence an established rule of law on the point in question, and the precedent fails to conform to it and accurately to express and apply it. We shall see later on that a precedent has no abrogative force. When the law is already settled, the sole right and duty of the judges is to follow it. A precedent *must* be declaratory whenever it *can* be, that is to say, whenever there is any law to declare. A decision which is wrong as being contrary to law is therefore one which is creative when it ought to have been merely declaratory.

But in the second place, a decision may be wrong as being contrary to reason. Where there is no settled law to declare and follow, the courts may make law for the occasion. In so doing it is their duty to follow reason, and so far as they fail to do so, their decisions are wrong, and the principles involved in them are of defective authority. Unreasonableness is one of the vices of a precedent, no less than of a custom and of certain forms of subordinate legislation.

It is not enough, however, that a decision should be contrary to law or reason. There is a second condition to be fulfilled before the courts are entitled to reject it. If the first condition were the only one, a conditionally authoritative precedent would differ in nothing from one which was merely persuasive. In each case the precedent would be effective only so far as its own intrinsic merits commended it to the minds of successive judges. But where a decision is authoritative, it is not enough that the court to which it is cited should be of opinion that it is wrong. It is necessary in innumerable cases to give effect to precedents notwithstanding such opinion. It does not follow that a precedent once established should be reversed simply because it is not

as perfect and rational as it ought to be. It is often more important that the law should be certain than that it should be ideally perfect. These two requirements are to a great extent inconsistent with each other, and we must often choose between them. Whenever a decision is departed from, the certainty of the law is sacrificed to its rational development. The evils of the uncertainty thus produced may far outweigh the very trifling benefit to be derived from the correction of the erroneous doctrine. The precedent, while it stood unreversed, may have been counted on in numerous cases as definitely establishing the law. Valuable property may have been dealt with in reliance on it. Important contracts may have been made on the strength of it. It may have become to any extent a basis of expectation and the ground of mutual dealings. Justice may therefore imperatively require that the decision, though founded in error, shall stand inviolate none the less. *Communis error facit jus*¹. 'It is better,' said Lord Eldon, 'that the law should be certain than that every judge should speculate upon improvements in it'².

It follows from this that, other things being equal, a precedent acquires added authority from the lapse of time. The longer it has stood unquestioned and unreversed, the more harm in the way of uncertainty and the disappointment of reasonable expectations will result from its reversal. A decision which might be lawfully overruled without hesitation while yet new, may after the lapse of a number of years acquire such increased strength as to be practically of absolute and no longer of merely conditional authority. This effect of lapse of time has repeatedly received judicial recognition.

'Viewed simply as the decision of a court of first instance, the authority of this case, notwithstanding the respect due to the judges who decided it, is not binding upon us; but viewed in its character and practical results, it is one of a class of decisions which acquire a weight and effect beyond that which attaches to the relative position of the court from which they proceed. It constitutes an authority which, after it has stood for so long a period unchallenged, should not, in the interests of public convenience, and having regard to the protection of private rights, be overruled by this court except upon very special considerations. For twelve years and upwards the case has continued unshaken by any judicial decision or criticism³.'

'When an old decided case has made the law on a particular

¹ It is to be remembered that the overruling of a precedent has a retrospective operation. In this respect it is very different from the repeal or alteration of a statute.

² *Shedden v. Goodrich*, 8 Ves. 497.

³ *Pugh v. Golden Valley Railway Company*, 15 Ch. D. at p. 334.

subject, the Court of Appeal ought not to interfere with it, because people have considered it as establishing the law and have acted upon it¹.

The statement that a precedent gains in authority with age must be read subject to an important qualification. Up to a certain point a human being grows in strength as he grows in age; but this is true only within narrow limits. So with the authority of judicial decisions. A moderate lapse of time will give added vigour to a precedent, but after a still longer time the opposite effect may be produced, not indeed directly, but indirectly through the accidental conflict of the ancient and perhaps partially forgotten principle with later decisions. Without having been expressly overruled or intentionally departed from, it may become in course of time no longer really consistent with the course of judicial decision. In this way the tooth of time will eat away an ancient precedent, and gradually deprive it of all authority and validity. The law becomes animated by a different spirit and assumes a different course, and the older decisions become obsolete and inoperative.

To sum the matter up, we may say that to justify the disregard of a conditionally authoritative precedent, it must be erroneous, either in law or in reason, and the circumstances of the case must not be such as to make applicable the maxim, *Communis error facit jus*. The defective precedent must not, by the lapse of time or otherwise, have acquired such added authority as to give it a title to permanent recognition notwithstanding the vices of its origin.

The disregard of a precedent assumes two distinct forms. The court to which it is cited may either overrule it, or merely refuse to follow it. Overruling is an act of superior jurisdiction. A precedent overruled is definitely and formally deprived of all authority. It becomes null and void, like a repealed statute, and a new principle is authoritatively substituted for the old. A refusal to follow a precedent, on the other hand, is an act of co-ordinate, not of superior jurisdiction. Two courts of equal authority have no power to overrule each other's decisions. Where a precedent is merely not followed, the result is not that the later authority is substituted for the earlier, but that the two stand side by side conflicting with each other. The legal antinomy thus produced must be solved by the act of a higher authority, which will in due time decide between the competing precedents, formally overruling one of them, and sanctioning the other as good law. In the meantime the matter remains at large, and the law uncertain.

¹ *Smith v. Keal*, 9 Q. B. D. at p. 352. See also *In re Wallis*, 25 Q. B. D. 180; *Queen v. Edwards*, 13 Q. B. D. 590; *Ridsdale v. Clifton*, 2 P. D. 306.

Precedents suppletory, not abrogative.—We have already seen the falsity of the theory that all precedents are declaratory. We have seen that they possess a distinct and legally recognized law-creating power. This power, however, is purely suppletory and in no degree abrogative. Judicial decisions may make law, but they cannot alter it. Where there is settled law already on any point, the duty of the judges is to apply it without question. They have no authority to substitute for it law of their own making. Their legislative power is strictly limited to supplying the vacancies of the legal system, to filling up with new law the gaps which exist in the old, to supplementing the imperfectly developed body of legal doctrine.

This statement, however, requires two qualifications. In the first place, it must be read subject to the undoubted power of the courts to overrule or disregard precedents in the manner already described. In its practical effect this is equivalent to the exercise of abrogative power. But in legal theory it is not so. The overruling of a precedent is not the abolition of an established rule of law. It is an authoritative denial that the supposed rule of law has ever existed. The precedent is so treated not because it has made bad law, but because it has never in reality made any law at all. It has not conformed to the requirements of legal efficacy. Hence it is that the overruling of a precedent, unlike the repeal of a statute, has retrospective operation. The decision is pronounced to have been bad *ab initio*. A repealed statute, on the contrary, remains valid and applicable as to matters arising before the date of its repeal. The overruling of a precedent is analogous not to the repeal of a statute, but to the judicial rejection of a custom as unreasonable or otherwise failing to conform to the requirements of customary law.

In the second place, the rule that a precedent has no abrogative power must be read subject to the maxim, *Quod fieri non debet, factum valeat*. It is quite true that judges ought to follow the existing law whenever there is any such law to follow. They are appointed to fulfil the law, not to subvert it. But if by inadvertence or otherwise this rule is broken through, and a precedent is established which conflicts with pre-existing law, it does not follow from this alone that such decision is destitute of legal efficacy. It is a well-known maxim of the law that a thing which ought not to have been done may nevertheless be valid when it is done. If, therefore, a precedent belongs to the class which is absolutely authoritative, it does not lose this authority simply because it is contrary to law and ought not to have been made. No court, for example, will be allowed to disregard a decision of the House of

Lords on such a ground; it must be followed without question, whether it is in harmony with prior law or not. So also with those which are merely conditionally authoritative. We have already seen that error is only one of two conditions, both of which are requisite to render allowable the disregard of such a precedent. And in this respect it makes no difference whether the error consists in a conflict with law or in a conflict with reason. It may well be better to adhere to the new law which should not have been made than to recur to the old law which should not have been displaced.

Grounds of the authority of precedents.—The operation of precedents is based on the legal presumption of the correctness of judicial decisions. It is an application of the maxim, *Res judicata pro veritate accipitur*. A matter once formally decided is decided once for all. The courts will listen to no allegation that they have been mistaken, nor will they reopen a matter once litigated and determined. That which has been delivered in judgment must be taken for established truth. For in all probability it is true in fact, and even if not, it is expedient that it should be held as true none the less. *Expedit reipublicae ut sit finis litium*. When therefore a question has once been judicially considered and answered, it must be answered in the same way in all subsequent cases in which the same question again arises. Only through this rule can that consistency of judicial decision be obtained, which is essential to the proper administration of justice. Hence the effect of judicial decisions in excluding the *arbitrium judicis* for the future, in providing predetermined answers for the questions calling for consideration in future cases, and therefore in establishing new principles of law.

The questions to which judicial answers are required are either questions of law or of fact. To both kinds the maxim, *Res judicata pro veritate accipitur*, is applicable. In the case of questions of law, this maxim means that the court is presumed to have correctly ascertained and applied the appropriate legal principle. The decision operates therefore as proof of the law. It is, or at all events is taken to be, a declaratory precedent. If the law so declared is at all doubtful, the precedent will be worth preserving as useful evidence of it. But if the law is already clear and certain, the precedent will be useless; to preserve it would needlessly cumber the books of reports, and it will be allowed to lapse into oblivion.

In the case of questions of fact, on the other hand, the presumption of the correctness of judicial decisions results in the creation of new law, not in the declaration and proof of old. The decision

becomes, in a large class of cases, a creative precedent. That is to say, the question thus answered ceases to be one of fact, and becomes for the future one of law. For the courts are now provided with a predetermined answer to it, and it is no longer a matter of free judicial discretion. The *arbitrium judicis* is now excluded by one of those fixed and authoritative principles which constitute the law.

For example, the meaning of an ambiguous statute is at first a pure question of fact. When for the first time the question arises whether the word 'cattle' as used by the statute includes horses, the court is bound by no authority to determine the matter in one way or the other. The occasion is one for the exercise of common sense and interpretative skill. But when it has once been judicially decided that 'cattle' does include horses, the question is for the future one of law and no longer one of fact. For it is incumbent on the courts in subsequent cases to act on the maxim, *Res judicata pro veritate accipitur*, and to answer the question in the same way as has been done already¹.

The operation of creative precedents is, therefore, the progressive transformation of questions of fact into questions of law. *Ex facto oritur jus*. The growth of case law involves the gradual elimination of that judicial liberty to which it owes its origin. In any system in which precedents are authoritative the courts are engaged in forging fetters for their own feet. There is of course a limit to this process. It is absurd to suppose that the final result of legal development will be the complete transformation of all questions of fact into questions of law. The distinction between law and fact is permanent and essential. What then is the limit? To what extent is precedent capable of effecting this absorption of fact into law?

Rationes decidendi.—In respect of this law-creating operation of precedents, questions of fact are divisible into two classes. For

¹ It will be understood that the word *fact* is here used in a wide sense to include everything which is not law. A question of law means one which is to be answered in accordance with a fixed and predetermined principle authoritatively established, and excluding the liberty of judges to answer the question at their own free will. All others are questions of fact in the wide sense which is here adopted, and which indeed must be adopted if the distinction between questions of law and those of fact is to be regarded as logically exhaustive. Every question, therefore, in which the *arbitrium judicis* is not excluded by any authoritative and binding principle, is a question of fact in this sense, whether it is, or is not, one of fact in one or other of the narrower uses of this equivocal term.

The statement in the text that the meaning of an ambiguous statute is a question of fact, may seem paradoxical at first sight. It is, indeed, a question of law in that loose and illogical sense in which every question for the court, as opposed to the jury, is one of law. And it is also, of course, a question as to what the law is. But a question of law does not mean one as to what the law is, but one which must be answered by the courts in accordance with a rule of law.

some of them do, and some do not, admit of being answered *on principle*. The former are those the answer to which is capable of assuming the form of a general principle. The latter are those the answer to which is necessarily specific. The former are answered by way of abstraction, that is to say by the elimination of the immaterial elements in the particular case, the result being a general rule applicable not merely to that single case but to all others which resemble it in its essential features. The other class of questions consists of those in which no such process of abstraction, no such elimination of immaterial elements, as will give rise to a general principle, is possible. The answer to them is based on the total circumstances of the concrete and individual case, and therefore produces no rule of general application. Now the operation of precedent is limited to one only of these classes of questions. Judicial decisions are a source of law only in the case of those questions of fact which admit of being answered on principle. These only are transformed by decision into questions of law. For in this case only does the judicial decision give rise to a rule which can be adopted for the future as a rule of law. Those questions which belong to the other class are permanently questions of fact. Their judicial solution leaves behind it no permanent results in the form of legal principles.

For example, the question whether the defendant did or did not make a certain statement is a question of fact, which does not admit of any answer save one which is concrete and individual. It cannot be answered on principle. It necessarily remains, therefore, a pure question of fact; the decision of it is no precedent, and establishes no rule of law. On the other hand, the question whether the defendant in making such a statement was or was not guilty of fraud or negligence, though it may be equally a question of fact, nevertheless belongs to the other class of such questions. It may well be possible to lay down a general principle on a matter such as this. For it is a matter which may be dealt with *in abstracto*, not necessarily *in concreto*. If, therefore, the decision is arrived at on principle, it will amount to a creative precedent, and the question, together with every other essentially resembling it, will become for the future a question of law, pre-determined by the rule thus established.

A precedent, therefore, is a judicial decision which contains in itself a principle. The underlying principle which thus forms its authoritative element is often termed the *ratio decidendi*. The concrete decision is binding between the parties to it, but it is the abstract *ratio decidendi* which alone has the force of law as regards the world at large. 'The only use of authorities or decided cases,'

says Sir George Jessel, 'is the establishment of some principle, which the judge can follow out in deciding the case before him ¹.' 'The only thing,' says the same distinguished judge in another case, 'in a judge's decision binding as an authority upon a subsequent judge is the principle upon which the case was decided ².'

This is the true significance of the familiar contrast between authority and principle. It is often said by judges that inasmuch as the matter before them is not covered by authority, they must decide it upon principle. The statement is a sure indication of the impending establishment of a creative precedent. It implies two things: first, that where there is any authority on the point, that is to say, where the question is already one of law, the duty of the judge is simply to follow the path so marked out for him; and secondly, that if there is no authority, and if, therefore, the question is one of pure fact, it is his duty if possible to decide it upon principle, that is to say, to formulate some general rule and to act upon it, thereby creating law for the future. It may be, however, that the question is one which does not admit of being answered either on authority or on principle, and in such a case a specific or individual answer is alone possible, no rule of law being either applied or created ³.

To avoid misapprehension, it may be advisable to point out that decisions as to the meaning of statutes are always general, and therefore establish precedents and make law. For such interpretative decisions are necessarily as general as the statutory provisions interpreted. A question of statutory interpretation is one of fact to begin with, and is decided on principle; therefore it becomes one of law, and is for the future decided on authority.

Judicial dicta.—Although it is the duty of courts of justice to decide questions of fact on principle if they can, they must take care in such formulation of principles to limit themselves to the requirements of the case in hand. That is to say, they must not lay down principles which are not required for the due decision of the particular case, or which are wider than is necessary for this purpose. The only judicial principles which are authoritative are those which are thus relevant in their subject-matter and limited in their scope. All others, at the best, are of merely persuasive efficacy. They are not true *rationes decidendi*, and are distinguished from them under the name of *dicta* or *obiter dicta*, things said by the way. The prerogative of judges is not to make law by formulating and

¹ *In re Hallett*, 13 Ch. D. at p. 712.

² *Osborne v. Roclett*, 13 Ch. D. at p. 785.

³ It is clearly somewhat awkward to contrast in this way the terms authority and principle. It is odd to speak of deciding a case on principle because there is no legal principle on which it can be decided.

declaring it—this pertains to the legislature—but to make law by applying it. Judicial declaration, unaccompanied by judicial application, is of no authority.

The sources of judicial principles.—Whence then do the courts derive those new principles, or *rationes decidendi*, by which they supplement the existing law? They are in truth nothing else than the principles of natural justice, practical expediency, and common sense. Judges are appointed to administer justice—justice according to law, so far as the law extends, but so far as there is no law, then justice according to nature. Where the civil law is deficient, the law of nature takes its place, and in so doing puts on its character also. But the rules of natural justice are not always such that he who runs may read them, and the light of nature is often but an uncertain guide. Instead of trusting to their own unguided instincts in formulating the rules of right and reason, the courts are therefore wisely in the habit of seeking guidance and assistance elsewhere. In establishing new principles, they willingly submit themselves to those various persuasive influences which, though destitute of legal authority, have a good claim to respect and consideration. They accept a principle, for example, because they find it already embodied in some system of foreign law. For since it is so sanctioned and authenticated, it is presumably a just and reasonable one. In like manner the courts give credence to persuasive precedents, to judicial *dicta*, to the opinions of text-writers, and to any other forms of ethical or juridical doctrine which seem good to them. There is, however, one source of judicial principles which is of special importance, and calls for special notice. This is the analogy of pre-existing law. New rules are very often merely analogical extensions of the old. The courts seek as far as possible to make the new law the embodiment and expression of the spirit of the old—of the *ratio juris*, as the Romans called it. The whole thereby becomes a single and self-consistent body of legal doctrine, containing within itself an element of unity and of harmonious development. At the same time it must be remembered that analogy is lawfully followed only as a guide to the rules of natural justice. It has no independent claim to recognition. Wherever justice so requires, it is the duty of the courts, in making new law, to depart from the *ratio juris antiqui*, rather than servilely to follow it.

It is surprising how seldom we find in judicial utterances any explicit recognition of the fact that in deciding questions on principle, the courts are in reality searching out the rules and requirements of natural justice and public policy. The measure of the prevalence of such ethical over purely technical consider-

ations is the measure in which case law develops into a rational and tolerable system as opposed to an unreasoned product of authority and routine. Yet the official utterances of the law contain no adequate acknowledgment of this dependence on ethical influences. 'The very considerations,' it has been well said, 'which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life'.¹ The chief reason of this peculiarity is doubtless to be found in the fictitious declaratory theory of precedent, and in the forms of judicial expression and reasoning which such theory has made traditional. So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality making new.

The respective functions of judges and juries.—The division of judicial functions between judge and jury creates a difficulty in the theory of precedent which requires some consideration. It is commonly said that all questions of fact are for the jury, and all questions of law for the judge. But we have already seen that creative precedents are answers to questions of fact, transforming them for the future into questions of law. Are such precedents then made by juries instead of by judges? It is clear that they neither are nor can be. No jury ever answers a question on principle; it gives decisions, but no reasons; it decides *in concreto*, not *in abstracto*. In these respects the judicial action of juries differs fundamentally from that of judges. The latter decide on principle, whenever this is possible; they formulate the *ratio decidendi* which underlies their decision; they strive after the general and the abstract, instead of adhering to the concrete and the individual. Hence it is that the decision of a judge may constitute a precedent, while that of a jury cannot. But in composite tribunals, where the jury decides the facts and the judge the law, how does the judge obtain any opportunity of establishing precedents and creating new law? If the matter is already governed by law, it will of course fall within his province; but if it is not already so governed, is it not a pure question of fact which must be submitted to the jury, to the total destruction of all opportunity of establishing any precedent in respect of it? The truth of the matter is that, although all questions of law are for the judge, it is very far from being true that all questions of fact are for the jury. There are very extensive and important portions of the sphere of fact which fall within the jurisdiction of the judge. It is within these portions that the law-creating operation of judicial decisions takes place. No jury, for example, is ever asked to interpret a statute or, speaking

¹ Holmes, *The Common Law*, p. 35.

generally, any other written document. Yet unless there is already some authoritative construction in existence, this is pure matter of fact. Hence that great department of case law which has its origin in the judicial interpretation of statute law. The general rule—consistently acted on, though seldom expressly acknowledged—is that a judge will not submit to a jury any question which he is himself capable of answering *on principle*. Such a question he answers for himself. For since it can be answered on principle, it provides a fit occasion for the establishment of a precedent and a new rule of law. It *ought* to be a matter of law, and can only become what it ought to be, by being kept from the jury and answered *in abstracto* by the judge. The only questions which go to a jury are those questions of fact which admit of no principle, and are therefore the appropriate subject-matter for those concrete and unreasoned decisions which juries give.

I have said that this rule, though acted on, is not expressly acknowledged. The reason is that judges are enabled to avoid such acknowledgment through recourse to the declaratory theory of precedent. As between judge and jury this theory is still in full force and effect, although when the rights and privileges of juries are not concerned, the courts are ready enough at the present day to acknowledge the essential truth of the matter. As between judge and jury, questions of fact are withdrawn from the exclusive cognizance of the latter by means of the legal fiction that they are already questions of law. They are treated as being already that which they are about to become. In a completely developed legal system they would be already true questions of law; the principle for their decision would have been already authoritatively determined. Therefore the judges make bold to deal with them as being already that which they ought to be, and thus the making of law by way of precedent is prevented from openly infringing upon the rights of juries to decide all questions which have not been already decided by the law.

JOHN W. SALMOND.

ENGLISH JUDGES AND HINDU LAW.

(CONCLUDING PAPER.)

AS the tribunal known as the Judicial Committee of the Privy Council is attracting considerable attention at the present moment, a little sketch of its history will be interesting and, perhaps, instructive.

The Judicial Committee of the Privy Council was formed in 1833 by Act of Parliament, 3 & 4 Wm. IV. c. 41. By s. 1 the members of the Privy Council who held or had held the offices of President of the Council, Lord Chancellor, Lord Keeper, or First Commissioner of the Great Seal of Great Britain, and those members who were or had been judges of either of the Superior Courts of Law or Equity in England, together with any other two members of the Privy Council who might be appointed for the purpose by the Crown, were formed into a committee to be called the Judicial Committee of the Privy Council, to be a tribunal to hear appeals to His Majesty in Council from the Courts of Admiralty, and the various courts in the East Indies and the plantations, colonies, and other dominions of the Crown abroad, from which an appeal lay to the King in Council, and to report and make recommendations thereon to His Majesty.

By s. 5 the Committee were prohibited from making any report or recommendation unless four members of the Committee were present; and by the same section power was reserved to the Crown to summon any other members of the Privy Council to attend the meetings of the committee.

S. 30 provided that two sums of £400 a year each, out of the consolidated fund, might be paid to two privy councillors, who had been Indian or colonial judges, who might, on the appointment of the Crown, attend the sittings of the Committee.

Persons who attended the sittings of the Committee either under the power reserved by the latter part of s. 5 or under the provisions of s. 30 were not members of the Committee, and could not, of course, be reckoned in order to make up the number of four members required by the first part of s. 5.

By an Act passed in 1844, 7 & 8 Vict. c. 49, the jurisdiction and powers of the Judicial Committee were extended, but its composition was not changed.

On February 3, 1844, Mr. T. Pemberton Leigh, an English

lawyer, was appointed a member of the Committee, without pay, under the last clause of the first section of the Act of 1833. He was afterwards created Lord Kingsdown, and remained an active member of the Committee until 1865.

On March 9, 1850, Sir Edward Ryan, who had been Chief Justice of the old Supreme Court at Calcutta, was appointed either under the last clause of s. 1 or under s. 30.

By an Act passed in 1851, 14 & 15 Vict. c. 83, a Court of Appeal in Chancery was created, and by s. 15 its judges were, if privy councillors, made members of the Judicial Committee.

On November 23, 1865, Sir Edward Ryan resigned, and Sir James Colville, who had also been Chief Justice of the Supreme Court at Calcutta, was appointed to attend the sittings of the Committee under s. 30 of the Act of 1833.

Sir Lawrence Peel was on June 23, 1858, appointed to attend the sittings of the Committee under the same section, and did so until December 1, 1874. Lord Kingsdown continued to attend the sittings of the Committee until the summer of 1865. He died in 1867.

On February 2, 1869, Sir Joseph Napier, who had been Lord Chancellor of Ireland, was appointed a member of the Committee under s. 1 of the Act of 1833.

On August 21, 1871, Her Majesty was, by statute 34 & 35 Vict. c. 91, s. 1, empowered to appoint, within twelve months, four persons who were or had been judges of one of the Superior Courts of Law or Equity in England, or a Chief Justice of Bengal, Madras, or Bombay, to act as members of the Judicial Committee at salaries of £5,000 a year each, and to fill up any vacancies in their offices which might occur within two years. Under this Act Sir Montague Smith and Sir Robert Collier, who had been judges of the Court of Common Pleas in England, Sir Barnes Peacock, who had been legal member of the Viceroy's Council and the first Chief Justice of Bengal, and Sir James Colville, were appointed to act as members of the Judicial Committee.

On November 24, 1871, Sir Mountague Bernard, the first Chichele Professor of international law at Oxford, was appointed an unpaid member of the Committee under s. 1 of the Act of 1833.

In 1876, by the Appellate Jurisdiction Act, 1876, 39 & 40 Vict. c. 59, Her Majesty was empowered to appoint four Lords of Appeal in Ordinary, who should aid the House of Lords in the hearing of appeals, and who should also, if privy councillors, be members of the Judicial Committee, and, subject to the due performance of their duties as Lords of Appeal in Ordinary, should sit and act as members of the Judicial Committee.

At the time when this Act was passed the time within which any further appointment to the Judicial Committee could have been made under the Act of 1871 had expired.

S. 14 of the Act of 1876 provided for the attendance at the Committee of such archbishops and bishops as were privy councillors as assessors on the hearing of ecclesiastical cases.

S. 5 provides that an appeal shall not be heard by the House of Lords unless three persons who answer to certain descriptions are present. Among such persons are such peers of Parliament as are for the time being holding, or have held, any of the offices in the Act described as high judicial office; and by s. 25 'high judicial office' includes, *inter alia*, the office of a paid judge of the Judicial Committee of the Privy Council. No Indian or colonial expert has ever been appointed under this Act, and the four appointments are now held by one Scottish and three English lawyers.

At the end of 1880 Sir James Colville died, and early in 1881 Sir Mountague Bernard and Sir Joseph Napier resigned.

On January 21, 1881, Sir Richard Couch, who had been Chief Justice of Bengal, was appointed an unpaid member of the Committee under s. 1 of the Act of 1833; and on March 2, 1881, Sir Arthur Hobhouse, an English barrister who had been legal member of the Viceroy's Council in India, was also appointed an unpaid member under the same section.

In 1881, by 44 Vict. c. 3, s. 1, every person who held or had held the office of a Lord Justice of Appeal was, if a member of the Privy Council of England, made a member of the Judicial Committee.

In 1887, by the Act 50 & 51 Vict. c. 70, s. 4, any person who should attend the sittings of the Judicial Committee under s. 30 of the Act of 1833 was made a member of the Committee for all purposes, and when there was only one, such person was to be entitled to receive the whole of the sum provided by that section, that is to say £800 a year; and by s. 5 the expression 'high judicial office,' for the purposes of the Act of 1876, was made to include the office of any member of the Judicial Committee of the Privy Council. After the passing of this Act Sir Richard Couch resigned his original appointment, and was reappointed under s. 30 of the Act of 1833 and s. 4 of the Act of 1887.

Sir Barnes Peacock died in 1894.

In 1895 colonial judges, to the number of five, were by 58 & 59 Vict. c. 44, s. 1, if privy councillors, added to the Committee. Under this Act Sir Henry Strong (Canada), Sir Henry De Villiers (Cape Colony), and Sir Samuel Way (Australia) are now members of the Committee.

On February 13, 1896, Lord James of Hereford was appointed

an unpaid member of the Committee under the last clause of s. 1 of the Act of 1833.

The fluctuation of opinion as to what amount of Indian and colonial experience or information should be available for the purpose of the Committee has been remarkable. For thirty-eight years, from 1833 to 1871, two paid assessors who had been Indian or colonial judges were provided for, and it is worthy of note that during that time the reputation of the Judicial Committee rose to its greatest height in India, and gained the entire confidence of the Indian people. It is true that during some of those years Lord Kingsdown, who was a really great judge, took a very active part in the hearing and decision of Indian cases, and showed a serious and sympathetic interest in Indian laws and customs ; but he had the assistance of Sir Edward Ryan, Sir James Colvile, and Sir Lawrence Peel as assessors, and it may be that the provision that Indian or colonial judges should attend the meetings of the Committee, not as judges but as assessors, was more wise and foreseeing than it has appeared to later legislators. Both Hindu and Mohammedan law may be roughly described as consisting of the precepts of the sages as interpreted by the customs of the people, and every one who has had experience of India knows that instances constantly occur where it is difficult, if not impossible, to ascertain from books what the customs of the people in some particulars are. In India English judges can consult their Hindu or Mussulman colleagues, and those who are members of the Civil Service have themselves had large experience of the people and their customs ; but a judge in England is very differently situated, and from his position as a judge is precluded from himself making inquiries which an assessor, whose only duty was to inform the judge, might make without loss of dignity.

In 1871 the policy of appointing assessors was abandoned in favour of making the Indian experts members of the Committee, and Sir James Colvile and Sir Barnes Peacock obtained seats on the Committee at salaries of £5,000 a year. This system lasted for five years, until 1876, when it was swept away by the Appellate Jurisdiction Act. Upon the death of Sir James Colvile in 1880 it appears to have been thought necessary to add another Indian expert, and Sir Richard Couch was made an unpaid member, and so continued until 1887, when assessors were abolished by statute, and he became entitled to a salary of £800. Since the death of Sir Barnes Peacock he has been the only Indian expert available, and has alone performed the duties which had been at various times and in different capacities performed by Sir Edward Ryan, Sir James Colvile, Sir Lawrence Peel, and Sir Barnes Peacock.

If the story of the past furnishes any guide for the future, it would appear that ambitious or heroic measures are neither necessary nor desirable as far as India is concerned. If the fourth section of the Act of 1887 were repealed and two assessors were appointed under s. 30 of the Act of 1833, and if, at the same time, it were arranged that the same one of the Lords of Appeal, Lord Lindley, for instance, should always take part in the hearing of Indian appeals, the conditions which existed from 1844 to 1865 would be very nearly reproduced. But at the same time it must not be forgotten that there are some decisions of the Judicial Committee which have caused and are causing great dissatisfaction and considerable distress in India, and it seems probable that confidence in the tribunal can never be re-established among the natives of India until those decisions have been reversed in some way, and the law of the courts again brought into accordance with the law of the people.

W. C. PETHERAM.

TRADING WITH THE ENEMY.

THE rule that, when one State is at war with another, all the subjects of the one are considered to be at war with all the subjects of the other, and that all intercourse and trade with the enemy is forbidden, is not peculiar to our own jurisprudence. In the leading case of *The Hoop* (1799) 1 C. Rob. 196, Sir William Scott (afterwards Lord Stowell) said:—

‘In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3) as an universal principle of law—“ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsae indicationes bellorum satis declarant.” . . . It appears from these passages to have been the law of Holland; Valin (l. iii. tit. 6, art. 3) states it to have been the law of France . . . it will appear from a case which I shall have occasion to mention (*The Fortuna*) to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general law in most of the countries of Europe.’

Nor was the principle new to the law of England. Although *The Hoop* may be regarded as the leading case, Sir William Scott in his judgment reviews a series of cases from the year 1747 onwards, in which the same principle had been recognized and acted upon by the Courts.

The principle has also been accepted in the United States. Thus, for instance, Wheaton, in his *Elements of International Law* (§ 309), says:—

‘One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war, without the license of their respective Governments.’

And Kent (*Commentaries*, vol. i. p. 66) affirms the same view:—

‘One of the immediate and important consequences of a declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. The idea that any commercial intercourse, or pacific dealing, can lawfully subsist between the peoples

of the powers at war, except under the clear and express sanction of the Government, and without a special license, is utterly inconsistent with the new class of duties growing out of a state of war. The interdiction flows necessarily from the principle already stated, that a state of war puts all the members of the two nations respectively in hostility to each other; and to suffer individuals to carry on a friendly or commercial intercourse, while the two Governments were at war, would be placing the act of government and the acts of individuals in contradiction to each other. It would counteract the operations of war, and throw obstacles in the way of public efforts, and lead to disorder, imbecility (*sic*), and treason.

In connexion with these observations, it may be remarked that a further reason for the rule that 'a declaration of war is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's license,' is succinctly given by Willes J., in delivering the judgment of the Court of Exchequer Chamber in the case of *Esposito v. Bowden* (1857) 7 E. & B. 763, at p. 779:—

'It is now fully established that, the presumed object of war being as much to cripple the enemy's commerce as to capture his property, a declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the Crown, is illegal.'

The penalty for such illegal trading is forfeiture. Any goods which British subjects are trading with the enemy are liable to be confiscated, and any British ship which is found engaged in trade with the enemy is similarly liable. The latter is, of course, the more important instance, and it may not be out of place to quote the instructions which are given to the Commanders of British men-of-war in the Admiralty Manual of Prize Law, 1888 (§ 38):—

'The Commander should detain any British Vessel which he may meet with trading with the Enemy, unless either:

'(1) He is satisfied that the Master was pursuing such trade in ignorance that war had broken out, or

'(2) The Vessel is pursuing such trade under a License from the British Government.'

The first of these exceptions covers more particularly those cases in which the vessel has sailed on her voyage before the commencement of hostilities. This exception is founded on a very obvious ground, and the case upon which it rests is *The Abby* (1804) 5 C. Rob. 251. *The Abby* was a British vessel which had sailed from Liverpool to the coast of Africa 'there to barter her cargo for slaves, and then to carry them to . . . Demerara, at that time a Dutch colony. The vessel sailed on the 11th of September, 1795. At that time, and until the declaration of hostilities, which issued on the 16th

of that month, Demerara could not be considered a colony of the enemy' . . . so that at the time of the vessel's sailing the trading was not illegal. 'The vessel sailed from the coast of Africa, in May, 1796, and was taken off the island of Demerara, after the surrender of that place to the British forces, and carried to Martinique'—then a British possession. After various proceedings had been taken, the case came before Sir William Scott in the High Court of Admiralty; he held the ship to be free from the charge of illegal trading, and made an order of restoration. There had, he considered, been neither the act nor the intention of trading with the enemy—not the act, because at the time of the importation, Demerara had been taken by the British; not the intention, because when the vessel sailed, hostilities had not broken out.

'No case,' said Sir William Scott, 'has been produced in which a mere *intention* to trade with the enemy's country, contradicted by the fact of its not being an enemy's country, has enured to condemnation. Where a country is known to be hostile, the commencement of a voyage towards that country may be a sufficient act of illegality; but where the voyage is undertaken without that knowledge, the subsequent event of hostility will have no such effect.'

The case of the second exception—trading with a license from the Government—was fully considered by the same eminent judge in the case of *The Hoop*, 1 C. Rob. 196, to which reference has already been made. He quoted Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3) as saying that sometimes the strict rule which forbids all trading with an enemy has been modified by exceptions, and that different species of traffic have been from time to time permitted; but that in every case it has been the act and permission of the sovereign:—

'By the law and constitution of this country, the sovereign alone has the power of declaring war or peace—He alone, therefore, who has the power of removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war. There may be occasions on which such an intercourse may be highly expedient. But it is not for individuals to determine the expediency of such occasions on their own notions of commerce, and of commerce merely, and possibly on grounds of private advantage not very reconcilable with the general interests of the State. It is for the State alone, on more enlarged views of policy, and on consideration of all circumstances that may be connected with such an intercourse, to determine when it shall be permitted, and under what regulations. In my opinion, no principle ought to be held more sacred than that this intercourse cannot subsist on any other footing than that of the direct permission of the State. Who can be

insensible to the consequences that might follow if every person in time of war had a right to carry on commercial intercourse with the enemy, and under colour of that, had the means of carrying on any other species of intercourse he might think fit? The inconvenience to the public might be extreme; and where is the inconvenience on the other side, that the merchant should be compelled, in such a situation of the two countries, to carry on his trade between them, if necessary, under the eye and control of the Government, charged with the care of the public safety?’

The case of *The Hoop*, it must be admitted, was rather a hard one, as the merchants had been for some time engaged in the trade; they had had the Royal License for previous ventures during the war, and, before this vessel sailed, they had applied to the Commissioners of Customs at Glasgow to know whether, in view of certain recently passed Acts, it was necessary to obtain a license for this voyage, and had been informed that, in the opinion of the law advisers of the Commissioners, such a license was not necessary. But Sir William Scott held in favour of the capture, and declined to make an order of restitution:—

‘It appears,’ said he, ‘that these parties had before applied to the Council for special orders, and had always obtained them. It is much to be regretted that they had not applied again to the same source of information. . . . The intention of the parties might be perfectly innocent; but there is still the fact against them of the actual contravention of the law, which no innocence of intention can do away.’

Thus, if the vessel is, in fact, trading with the enemy, she will not be protected by innocence of intention. But innocence of intention, as shown by various actions, may have an important bearing on the question whether, in fact, she is trading with the enemy. In the case of *The Mercurius* (1808) Edwards, 53, a ship under Bremen colours, at the time of capture was proceeding with a cargo of brandies on a voyage from Bordeaux to Bremen, but with directions to put into a British port for the purpose of obtaining a license from the British Government. The court had every reason to believe that there was an honest intention to come to this country to procure the license, and to act conformably with it when granted.

‘The parties have acted throughout *aperto voto*,’ said Sir William Scott; ‘there is nothing to lead to a suspicion of disingenuous conduct. Then the question comes to this, whether such a voyage intended ultimately to Bremen, but first to this country, for the purpose of obtaining a license, without which it was to be relinquished, is a continuous voyage, and therefore illegal? I think clearly not: it is a contingent voyage, depending upon the determination, not of the parties themselves, but of the British Govern-

ment; if the ship went on at all, it was to be the act of the British Government.'

On this ground, that the voyage was not continuous but contingent, he pronounced for restoration. And it may be observed that a similar decision had been given in the previous year in the somewhat similar case of *The Minna* (1807) Edwards, 55, n., which had been captured on a voyage from Bordeaux destined ultimately to Bremen, but with orders to touch at a British port, from whence she was to resume her voyage, if permitted.

How strict is the rule that, in order to legalize trading with the enemy, there must be a license from the Crown, is illustrated by the decision in *The Hoop* already referred to, and also by the decision in *The Carlotta* (1814) 1 Dods. 387.

'There is,' said Sir William Scott in the latter case, 'no principle of law more recognized than this, that during the existence of hostilities between the Crown of Great Britain and other countries, it is unlawful for British subjects to carry on a commercial intercourse with the inhabitants of those countries. The consent of the Crown to such a course of trade must necessarily be interposed in some way or other. The particular mode in which the consent may be expressed is not material. It may be signified in a variety of ways—by a license granted to the individual for the special occasion, by an Order in Council, by Proclamation, or under the authority of an Act of Parliament, to which the Crown is necessarily a party.'

He held, however, that a certain proclamation by the Lord Lieutenant of Ireland, under which the transaction was attempted to be justified, was not relevant, and condemned the property; at the same time commending the case, on its merits, to the equitable consideration of the Government.

Where a license has been granted, the Court will not, of course, extend the terms of it. Thus, for instance, where a license to the port of an enemy had been granted for certain enumerated articles, and other articles not enumerated were sent at the same time, it was held by Sir William Scott in *The Friendship* (1801) 4 C. Rob. 96, that those other goods were liable to condemnation, notwithstanding the fact that their ulterior destination was a neutral port. But, on the other hand, the license will be liberally interpreted. This was illustrated by the decision in *The Vrow Cornelia* (1810) Edwards, 349. In that case a license had been granted for the importation from France of a cargo of brandy, which for convenience was shipped from Bordeaux, not on one vessel, but on two. One of these vessels carried the original license, and the other an attested copy. The latter vessel was captured by British cruisers,

and brought in for adjudication. But Sir William Scott pronounced against the captors :—

‘In the use and application of licenses,’ said he, ‘the Court will not limit the parties to a literal construction. It is sufficient that they show under the difficulties of commerce that they come as near as they can to the terms of the license; and where that is done, the Court will not prevent them from having the entire benefit intended by His Majesty’s Government. If I did not adopt this rule, I should inflict a severe wound upon British commerce, than which nothing can be further from my inclination; and if the cruisers expect a more rigid construction of licenses from me, they will find themselves disappointed. Wherever I am satisfied that there is no bad faith in the parties, and no undue extension of the terms of a license beyond the meaning of the Council Board, any little informalities, or trifling deviations, shall not injure them.’

Passing from the trading itself to the ancillary contract of insurance, it is to be observed that the legality of the insurance depends on the legality of the trade. Since unlicensed trading with the enemy is illegal, no action can be maintained on a policy entered into with respect to it—this rule was firmly established in the case of *Potts v. Bell* (1800) 8 T. R. 548. Conversely, the effect of the license, when granted, is not only to protect ship and cargo, but also to legalize the trading so as to make it a proper subject for insurance, and to enable an action to be brought on the policy. This was put beyond doubt by the decisions of Lord Ellenborough C. J. in *Barker v. Blades* (1808) 9 East, 283, and in the leading case of *Uparicha v. Noble* (1811) 13 East, 332. In the latter case Lord Ellenborough said :—

‘The legal result of the license granted in this case is, that not only the plaintiff, the person licensed, may sue in respect of such licensed commerce in our courts of law, but that the commerce itself is to be regarded as legalized for all purposes of its due and effectual prosecution. To hold otherwise would be to maintain a proposition repugnant to national good faith and the honour of the Crown. The Crown may exempt any persons and any branch of commerce, in its discretion, from the disabilities and forfeitures arising out of a state of war: and its license for such purpose ought to receive the most liberal construction.’

That they did receive such a construction is evident from a series of decisions, of which may be taken as instances *Feiss v. Newnham* (1812) 16 East, 197; *De Tastet v. Taylor* (1812) 4 Taunt. 233; and *Flindt v. Scott* (1814) 5 Taunt. 674. In the same connexion may be mentioned the earlier case of *Kensington v. Inglis* (1807) 8 East, 273, which was heard in error, and in which Lord

Ellenborough C.J., delivering the judgment of the Court, held that a license granted for trading with an alien enemy for specie and goods to be brought from the enemy's country, in his ships, into our colonial ports, incidentally legalized an insurance not only on the specie and goods, but also on the enemy's ship which carried them. While the cases of *Pieschell v. Allnutt* (1813) 4 Taunt. 792, and *Butler v. Allnutt* (1816) 1 Stark. 222, show that the carrying of articles not named in the license will not invalidate an insurance upon the licensed articles which are carried.

Coming back to the general rule which prohibits trading with the enemy, it may be observed that in the leading case of *Esposito v. Bowden* (1857) 7 E. & B. 763, it was held that, since it was forbidden to a British subject to trade with the enemy, the declaration of war made it illegal to ship a cargo from an enemy's port, even on board a neutral vessel, and so put an end to a contract of affreightment which had been made before that declaration but remained to be executed afterwards. In that case Willes J., delivering the judgment of the Court, quoted what Lord Tenterden had written, nearly fifty years before, on the subject of the dissolution of contract:—

'Another general rule of law furnishes a dissolution of these contracts (i. e. for the carriage of goods in merchant ships) by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the Government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the State to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end, the merchant must unlade his goods, and the owners find another employment for their ship' (see Abbott on Shipping, 13th ed., at p. 754).

The prohibition of trading with the enemy extends even to the case of bills of exchange. In the case of *Willison v. Patteson* (1817) 7 Taunt. 439, the defendants were British merchants in London, who had in their hands some property belonging to one Michelin, a French subject. France was then at war with the United Kingdom; during that war Michelin drew bills on the defendants, and the defendants accepted them. These bills were then endorsed to the plaintiff, who was an English-born subject residing in France. After the close of the war, when peace had been restored, an action was brought upon the bills, but it was held that no such action would lie, as the bills were contracts with an alien enemy, and therefore void from the first. In contrast with this should be

If the story of the past furnishes any guide for the future, it would appear that ambitious or heroic measures are neither necessary nor desirable as far as India is concerned. If the fourth section of the Act of 1887 were repealed and two assessors were appointed under s. 30 of the Act of 1833, and if, at the same time, it were arranged that the same one of the Lords of Appeal, Lord Lindley, for instance, should always take part in the hearing of Indian appeals, the conditions which existed from 1844 to 1865 would be very nearly reproduced. But at the same time it must not be forgotten that there are some decisions of the Judicial Committee which have caused and are causing great dissatisfaction and considerable distress in India, and it seems probable that confidence in the tribunal can never be re-established among the natives of India until those decisions have been reversed in some way, and the law of the courts again brought into accordance with the law of the people.

W. C. PETHERAM.

TRADING WITH THE ENEMY.

THE rule that, when one State is at war with another, all the subjects of the one are considered to be at war with all the subjects of the other, and that all intercourse and trade with the enemy is forbidden, is not peculiar to our own jurisprudence. In the leading case of *The Hoop* (1799) 1 C. Rob. 196, Sir William Scott (afterwards Lord Stowell) said:—

‘In my opinion there exists such a general rule in the maritime jurisprudence of this country, by which all subjects trading with the public enemy, unless with the permission of the sovereign, is interdicted. It is not a principle peculiar to the maritime law of this country; it is laid down by Bynkershoek (Qu. Jur. Pub., lib. 1, c. 3) as an universal principle of law—“ex naturâ belli commercia inter hostes cessare non est dubitandum. Quamvis nulla specialis sit commerciorum prohibitio, ipso tamen jure belli commercia esse vetita, ipsae indicationes bellorum satis declarant.” . . . It appears from these passages to have been the law of Holland; Valin (l. iii. tit. 6, art. 3) states it to have been the law of France . . . : it will appear from a case which I shall have occasion to mention (*The Fortuna*) to have been the law of Spain; and it may, I think, without rashness be affirmed to have been a general law in most of the countries of Europe.’

Nor was the principle new to the law of England. Although *The Hoop* may be regarded as the leading case, Sir William Scott in his judgment reviews a series of cases from the year 1747 onwards, in which the same principle had been recognized and acted upon by the Courts.

The principle has also been accepted in the United States. Thus, for instance, Wheaton, in his *Elements of International Law* (§ 309), says:—

‘One of the immediate consequences of the commencement of hostilities is, the interdiction of all commercial intercourse between the subjects of the States at war, without the license of their respective Governments.’

And Kent (*Commentaries*, vol. i. p. 66) affirms the same view:—

‘One of the immediate and important consequences of a declaration of war, is the absolute interruption and interdiction of all commercial correspondence, intercourse, and dealing between the subjects of the two countries. The idea that any commercial intercourse, or pacific dealing, can lawfully subsist between the peoples

ations is the measure in which case law develops into a rational and tolerable system as opposed to an unreasoned product of authority and routine. Yet the official utterances of the law contain no adequate acknowledgment of this dependence on ethical influences. 'The very considerations,' it has been well said, 'which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life¹.' The chief reason of this peculiarity is doubtless to be found in the fictitious declaratory theory of precedent, and in the forms of judicial expression and reasoning which such theory has made traditional. So long as judges affect to be looking for and declaring old law, they cannot adequately express the principles on which they are in reality making new.

The respective functions of judges and juries.—The division of judicial functions between judge and jury creates a difficulty in the theory of precedent which requires some consideration. It is commonly said that all questions of fact are for the jury, and all questions of law for the judge. But we have already seen that creative precedents are answers to questions of fact, transforming them for the future into questions of law. Are such precedents then made by juries instead of by judges? It is clear that they neither are nor can be. No jury ever answers a question on principle; it gives decisions, but no reasons; it decides *in concreto*, not *in abstracto*. In these respects the judicial action of juries differs fundamentally from that of judges. The latter decide on principle, whenever this is possible; they formulate the *ratio decidendi* which underlies their decision; they strive after the general and the abstract, instead of adhering to the concrete and the individual. Hence it is that the decision of a judge may constitute a precedent, while that of a jury cannot. But in composite tribunals, where the jury decides the facts and the judge the law, how does the judge obtain any opportunity of establishing precedents and creating new law? If the matter is already governed by law, it will of course fall within his province; but if it is not already so governed, is it not a pure question of fact which must be submitted to the jury, to the total destruction of all opportunity of establishing any precedent in respect of it? The truth of the matter is that, although all questions of law are for the judge, it is very far from being true that all questions of fact are for the jury. There are very extensive and important portions of the sphere of fact which fall within the jurisdiction of the judge. It is within these portions that the law-creating operation of judicial decisions takes place. No jury, for example, is ever asked to interpret a statute or, speaking

¹ Holmes, *The Common Law*, p. 35.

generally, any other written document. Yet unless there is already some authoritative construction in existence, this is pure matter of fact. Hence that great department of case law which has its origin in the judicial interpretation of statute law. The general rule—consistently acted on, though seldom expressly acknowledged—is that a judge will not submit to a jury any question which he is himself capable of answering *on principle*. Such a question he answers for himself. For since it can be answered on principle, it provides a fit occasion for the establishment of a precedent and a new rule of law. It *ought* to be a matter of law, and can only become what it ought to be, by being kept from the jury and answered *in abstracto* by the judge. The only questions which go to a jury are those questions of fact which admit of no principle, and are therefore the appropriate subject-matter for those concrete and unreasoned decisions which juries give.

I have said that this rule, though acted on, is not expressly acknowledged. The reason is that judges are enabled to avoid such acknowledgment through recourse to the declaratory theory of precedent. As between judge and jury this theory is still in full force and effect, although when the rights and privileges of juries are not concerned, the courts are ready enough at the present day to acknowledge the essential truth of the matter. As between judge and jury, questions of fact are withdrawn from the exclusive cognizance of the latter by means of the legal fiction that they are already questions of law. They are treated as being already that which they are about to become. In a completely developed legal system they would be already true questions of law; the principle for their decision would have been already authoritatively determined. Therefore the judges make bold to deal with them as being already that which they ought to be, and thus the making of law by way of precedent is prevented from openly infringing upon the rights of juries to decide all questions which have not been already decided by the law.

JOHN W. SALMOND.

which was then in want of hands. During that voyage he was treated like the rest of the crew; he did his duty to the satisfaction of the captain (the defendant); on his arrival he was taken over by the commissary with other Dutch prisoners; and at the time of action brought he was in custody as a prisoner of war. The action was brought for his wages according to the contract, and a verdict was given for £24. On a motion to set the verdict aside on the ground that the contract was one with an alien enemy, Eyre C. J. and Heath and Rooke JJ. discharged the rule: the former on the ground that the plaintiff was not a Dutch-born subject, and was not in fact an alien enemy at the time when the contract was made; the two latter on the wider ground that a prisoner of war is, for certain purposes, under the king's protection, and that he might maintain an action in certain cases, of which this was one. This view appears to have found more acceptance later. In *Maria v. Hall* (1800) 2 Bos. & P. 236, a French prisoner of war confined in the prison at Liverpool brought an action against the master of the ship on which he had come from the West Indies, for compensation for working the ship home. A motion was made to stay proceedings until the plaintiff should give security for costs, on the ground that the case of a prisoner of war was different from the common case of a foreigner serving on board a British ship who (as had been decided in *Henschen v. Garves* (1794) 2 H. Blackstone, 384; and in *Jacobs v. Stevenson* (1797) 1 Bos. & P. 96) was not compellable to give such security. But Heath J. 'observed, that it had been determined that a prisoner of war may maintain an action on a contract for wages,' and the Court (*absente* Lord Eldon C. J.) rejected the application.

But while the alien resident here has these various rights, he has also various duties; and the same rules which prohibit British subjects from engaging in trade with the enemy prohibit him also. This was laid down by Sir William Scott in *The Indian Chief* (1801) 3 C. Rob. 12. In that case a cargo had been shipped at Batavia (which was then in the hands of our enemy and an enemy port) on behalf of a Mr. Miller, who was an American merchant, and American Consul, at Calcutta. The cargo was captured, but the decree of condemnation was resisted on various grounds. But Sir William Scott held that the fact that the merchant was Consul did not affect his actions or his relation as merchant, and that, being resident in Calcutta, he must, so far as this matter was concerned, be taken to be a British merchant. So, also, a British subject resident and carrying on trade in an enemy's country is, equally with an alien enemy, incapable of suing in the courts of this country, as was held in the case of *McConnell v. Hector* (1802)

3 Bos. & P. 113. In the case of *The Danous* (1802), cited in a note to *The Nayade* (1802) 4 C. Rob. 251, at p. 255, 'a British-born subject, resident in the English factory at Lisbon, was allowed the benefit of a Portuguese character, so far as to render his trade with Holland (at war with England, but not with Portugal) not impeachable as an illegal trade.' While in *The Neptunus* (1807) 6 C. Rob. 403, at p. 408, Sir William Scott said:—

'It has been decided, both in this Court and in the Court of Appeal, that though a British subject, resident abroad, may engage generally in trade with the enemy, he cannot carry on such a trade in articles of a contraband nature. The duties of allegiance travel with them, so as to restrain them from supplying articles of that kind to the enemy.'

And it may be added that in *The Benjamin Franklin* (1806) 6 C. Rob. 350, the Court declined to entertain a suit for wages, on the part of a British pilot, for navigating a foreign ship to an enemy's port.

But, omitting the cases of contraband and breach of blockade, neutrals who are resident outside the British dominions are not prohibited from trading with the enemies of Britain. Indeed, such trading has been recognized to be legal, and insurances with regard to it have been enforced by our tribunals. As early as 1786, Lord Mansfield, in *Gist v. Mason*, 1 T. R. 88, upheld a policy on neutral property, on a neutral vessel bound to an enemy's port.

'This,' said he, 'upon the face of it, is the case of a neutral vessel. It is nowhere laid down that policies on neutral property, though bound to an enemy's port, are void. . . . By the maritime law, trading with an enemy is cause of confiscation in a subject, provided he is taken in the act; but this does not extend to a neutral vessel.'

Similarly, in the case of goods which are found being traded with the enemy, if they are the property of neutrals resident abroad, and if the trading is the trading of these neutrals, the goods will not be condemned. But where the goods are apparently the property of a British subject, there must be clear proof of neutral ownership in order to avoid the penalty of condemnation. The plea has frequently failed through want of sufficiently clear proof. Thus, for instance, in *The Jonge Pieter* (1801) 4 C. Rob. 79, goods purchased in England were shipped for an enemy's port, but seized by a British cruiser; it was set up that they belonged to an American, but, in the absence of documentary proof, a decree of condemnation was made. Similarly, in *The Samuel* (1802) 4 C. Rob. 284, n., where the goods had been purchased by a neutral on account of a British subject, it was held that the neutral was merely

an agent, and the British subject the principal ; and the goods were condemned. The goods were also condemned in the case of *The Nayade* (1802) 4 C. Rob. 251, as the allegation that they belonged to a neutral was held not to have been made out. In *The Franklin* (1805) 6 C. Rob. 127, a shipment of tobaccó had been made from Virginia to France, with which we were then at war, and had been captured by a British cruiser. The property appeared to be the joint property of I. and W. Bell, partners of a trading house in America and in London, the one being resident across the Atlantic, and the other here. It was contended that the latter had in fact no interest in the shipment, but he was unable to produce satisfactory evidence to this effect, and the Court, being of opinion that there was a joint interest in the property, condemned a moiety of it.

The old general rule that the property of an alien enemy may be seized and confiscated has been modified in various ways so far as that property when in the country of either of the belligerents is concerned ; and as regards the capture of such property at sea, there is the important clause (2) in the Declaration of Paris, 1856, that 'The neutral flag covers enemy's goods, with the exception of contraband of war.' But these exceptions have no reference to the case of goods belonging to the enemy, and found on a ship belonging to either of the belligerents. In such case, the old general rule still prevails. And it may be added that goods which are in the course of transit to the enemy, and which are designed to become the enemy's property on arrival, are treated generally as enemy's goods. Thus in *The Sally* (1795) 3 C. Rob. 300, *π.*, the judgment of the Lords—present, the Earl of Mansfield, Sir R. P. Arden (Master of the Rolls), and Sir W. Wynne—was as follows :—

'It has always been the rule of the Prize Courts, that property going to be delivered in the enemy's country, and under a contract to become the property of the enemy immediately on arrival, if taken *in transitu*, is to be considered as enemy's property. When the contract is made in time of peace or without any contemplation of war, no such rule exists :—But in a case like the present, where the form of the contract was framed directly for the purpose of obviating the danger apprehended from approaching hostilities, it is a rule which unavoidably must take place. . . . Supposing that it was to become the property of the enemy on delivery, capture is considered as delivery : The captors, by the rights of war, stand in the place of the enemy, and are entitled to a condemnation of goods passing under such a contract, as of enemy's property.'

The same rule was applied by Sir William Scott in *The Atlas* (1801) 3 C. Rob. 299, and *The Anna Catharina* (1802) 4 C. Rob. 107, while it was held not to be applicable—owing to the fact that the contracts had not been made in contemplation of war—in *The Vrow*

Margaretha (1799) 1 C. Rob. 336, and *The Packet de Bilbao* (1799) 2 C. Rob. 133. In the latter case Sir William Scott considered the rule at some length, saying that the same treatment which is given to such contracts when made in time of peace cannot be given to them in time of war: 'for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection; on every contemplation of a war, this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of all rights of capture.' And it may be observed that in this respect the law of the United States appears to be similar to our own (Kent's Commentaries, vol. i. p. 87; Halleck's International Law, 1878 ed., vol. ii. p. 130).

The subject of the last paragraph, as well as the general subject of this paper, have, happily, for many years been matters of legal history rather than of practical law. But the recent Transvaal war has brought them again within the latter sphere, and the case of *The Mashona*, decided at Cape Town on March 13, 1900—reported in *The Cape Times* of the following day—furnishes the most recent decision. The facts in that case were briefly as follows. Shortly after the outbreak of the war between Great Britain and the Transvaal, *The Mashona*, a British ship, sailed from New York with cargo for Algoa Bay, which was to be the first port of call, and Delagoa Bay. Some of the cargo was consigned to individuals and to firms carrying on business at Pretoria and other places in the Transvaal; this was to be landed at Delagoa Bay, and thence sent on to its inland destination by rail in the ordinary course. *The Mashona* proceeded on her voyage direct to Algoa Bay, but just before she reached it she was seized by H.M.S. *Partridge*, and brought to Table Bay, where she was placed in the custody of the marshal of the Prize Court. Both the cargo consigned to the Transvaal and the vessel herself were claimed as lawful prize: the former on the ground that it was enemy's property and unprotected, the latter on the ground that she, a British ship, was trading with the enemy. Against these charges it was contended that the consignees were hostile only by reason of domicile, and that they had done what they could to change the destination of the goods; that, as regards the ship, neither the owners, the charterers, nor the master had any intention to trade with the enemy, that they had acted with perfect good faith, and that the master had in fact intended to pass a bond at Algoa Bay undertaking not to take the goods to Delagoa Bay without the permission of the proper authorities. The case came before the Supreme Court of Cape Colony, sitting as a Prize Court, and, singularly enough, the three judges

who composed it—the Chief Justice, Mr. Justice Buchanan, and Mr. Justice Lawrence (Judge-President of the High Court of Griqualand West)—came to different conclusions. The Chief Justice was of opinion that the cargo in question should be condemned, but not the ship; Mr. Justice Buchanan that neither ship nor cargo should be condemned; and Mr. Justice Lawrence that a sentence of condemnation should be pronounced against both. In the result, since the Court was divided two to one in favour of condemning the cargo, and two to one against condemning the ship, the cargo in question was condemned and the ship restored.

As regards the goods, it may be mentioned that the members of the Court differed, on the facts, as to whether the owners of the goods had done all in their power to alter the destination of them—Mr. Justice Buchanan considering that they had, the Chief Justice and Mr. Justice Lawrence that they had not. This question of destination, however, though discussed at some length, seems of secondary importance, except as showing that the goods were the property—or, in prize law, should be regarded as the property—of residents in the Transvaal; and such ownership was not apparently denied. The main reason for condemning the goods appears rather, from the judgments of the two last-mentioned judges, to have been that the goods were enemy's goods, captured on the high seas and on a non-neutral ship. It will, however, be observed that this view involves the assumption that the rules which apply to the capture of goods belonging to the enemy because they belong to the enemy, apply also to the capture of goods belonging to those who are impressed with enemy character not by nationality but only by domicile. It does not appear that any cases were cited to this effect. But there is, as has already been shown, ample authority for the proposition that, in question of trading with the enemy, those who are resident in the enemy's territory are generally to be regarded as enemies; and it may well be considered that a like principle is applicable to the question of property in goods, particularly when those goods are on their way to the enemy's country.

With regard to the ship, the question turned mainly as to whether, on the facts, she came under the rule laid down in *The Hoop*, or whether her case was analogous to those of *The Minna* and *The Mercurius* already referred to. The Chief Justice, who delivered the leading judgment, took the latter view. He referred particularly to these three cases, and, after quoting the words at the close of Lord Stowell's judgment in *The Mercurius*—'I cannot, under any view of the case, bring myself to regard it as a fraudulent continuous voyage; there was no act, either done or to be done, to found the imputation of fraud; on the contrary, there is sufficient

proof of an honest intention to come to this country to procure the license, and to act conformably to it when granted'—he went on to say:—

'In the same manner there appears to me sufficient proof in the present case of an honest intention to pass a bond undertaking not to take the goods to Delagoa Bay except with the permission of the proper authorities. There was no concealment on the part of the charterers, or the owners, or the master; on the contrary, they all acted with the utmost *bona fides*, and with the sincere desire to give the authorities all the information and assistance in their power. . . . The presumption of an intention of trading with the enemy, arising from the fact that the ship was carrying enemy's goods consigned to Delagoa Bay and destined for the enemy's country, is entirely rebutted by the conduct of all the parties interested in the ship. The claim for restitution of the ship must consequently be allowed.'

And the judgment of Mr. Justice Buchanan proceeds on the same general view, and is to the same effect.

The judgment of Mr. Justice Lawrence—which, with regard to the ship, is the dissenting judgment—cannot, however, be lightly passed over. After dealing with the case of the cargo and with some questions relating to the ship, Mr. Justice Lawrence goes on to say:—

'It appears to me that, as soon as the war broke out, it became the duty of the master to decline to convey any goods which, from the papers in his possession, appeared to be the property of enemy consignees. His contract of affreightment could not lawfully be fulfilled, and he should have acted as laid down in the passage from Lord Tenterden's book, cited above. The only point which remains is the question whether it has been established that there was no intention on the part of the master of the ship to trade with the enemy except with permission of the proper authorities. In the circumstances, such a defence must be established by very clear proof; and, although there is no reason whatever to impute any disloyal intention, or *mala fides*, to the owners, charterers, agents, or master, I have come reluctantly to the conclusion that the proof of non-liability on this ground has not been made out. Had the ship first touched at Cape Town, a course would doubtless have been adopted which, as in other cases, would have secured immunity; and it certainly seems probable, after what happened in the case of *The Beatrice*, that a similar course would have been followed in this case, had it not been for the intervention of *The Partridge* at Port Elizabeth. . . . In the case of *The Mercurius*, decided by Lord Stowell in 1808 (Edwards, 53), which is certainly the strongest case in favour of the claimants, the court held it proved that she was, when seized, on her way to a British port for the purpose of applying for a license to proceed from a hostile to a neutral port. That she had directions to do so was, as the court held, "disclosed in the

papers, and as strongly guaranteed as any fact could be." If in this case *The Mashona* had taken a cargo at New York for Delagoa Bay only, but was proved to have touched at a British port *proprio motu* and under directions from the charterers, for a similar purpose, the cases would have been parallel. As it is, I fear that the parallel fails in an essential particular. In the present case, as I suggested during the argument, there seems to be an absence of proof that it was not the intention of the master to deliver these goods to the consignees unless prevented from doing so by some competent authority; and this cannot be regarded as equivalent to proof that he intended to apply for and obtain a license before engaging in intercourse which, in the absence of the license, was of an unlawful character. From the moment that this ship left New York harbour I think she was liable *stricto jure*—a liability which she doubtless shared with many other vessels of the British Mercantile Marine—to seizure and condemnation; as she was still without a license when seized, *stricto jure* the liability remains. At the same time I must add that I in no way regret that my colleagues have been able to come to the conclusion that the further proof adduced by the charterers is sufficient for the discharge of the ship; since, had she been condemned, it would have been difficult to conceive a stronger case for the indulgence of the Crown.'

It need hardly be observed that the prohibition against trading with the enemy is of a much more comprehensive character than the provisions against contraband and breach of blockade; because, while the latter are matters principally as between the belligerent state and neutrals, the former is a matter between the belligerent state and its own subjects. The distinction between the two was clearly pointed out by Sir William Scott in the case of *The Jonge Pieter* (1801) 4 C. Rob. 79, cited in both the judgments above quoted. That case had reference to the condemnation of a shipment of goods made in London for Embden, and, as appeared in the papers, with an ulterior purpose of sending them on to Amsterdam, which was then blockaded by the British.

'The whole case,' said Sir William Scott, 'turns on the question of property. . . . Whether the property is to be taken as residing in the English shipper, or in the American merchant for whom it is claimed. If they are the goods of the American merchant, the only question will be, Whether, Amsterdam being under blockade, such a trade is not liable to the penal consequence of breaking the blockade? If they are the property of English subjects, the same question will arise: and also, an additional question, Whether, on their part, it is not such a circuitous trading with the enemy as will make the property, on that ground, liable to confiscation?'

'On the first point, supposing the cargo to be American property, I am not inclined to think that it would be affected by the blockade, on the present voyage. The blockade of Amsterdam is, from the nature of the thing, a partial blockade, a blockade by sea; and if

the goods were going to Embden, with an ulterior destination by land to Amsterdam, or by an interior canal navigation, it is not, according to my conception, a breach of the blockade. But in the case of a British subject, shipping goods to go to the enemy, through a neutral country, I am afraid the penalty would be incurred. Without the license of Government no communication, direct or indirect, can be carried on with the enemy. . . . The interposition of a prior port makes no difference; all trade with the enemy is illegal; and the circumstance that the goods are to go first to a neutral port will not make it lawful. The trade is still liable to the same abuse, and to the same political danger, whatever that may be. I can have no hesitation in saying that, during a war with Holland, it is not competent to a British merchant to send goods to Embden, with a view to sending them forward on his own account to a Dutch port, consigned by him to persons there, as in the ordinary course of commerce.'

Sir William Scott then went on to consider whether there was sufficient evidence to rebut the presumption that the goods in question were the property of the British merchant who had shipped them, and, finding that there was not, pronounced for confiscation.

J. DUNDAS WHITE.

THE COMPANIES ACT, 1900.

THE policy of the Legislature in the Companies Act, 1862, was to allow Companies formed under it the utmost freedom both in dealing with the public and in managing their own internal affairs. Certain safeguards it was necessary to adopt where companies were trading on contributed capital and with limited liability; but they were few and simple: that the company should be kept to the objects defined in its memorandum of association, that notice of a company's liability being limited—where it was so—should be brought home to all persons dealing with it, that shares should be paid for in full either in cash or its equivalent, and that the capital so contributed—the creditors' only available fund—should by no artifice or subterfuge be reduced without the sanction of the Court: these may be said to almost exhaust the list of statutory safeguards. To say that this policy of commercial freedom has proved a failure would not be true: so far from this being the case it has conferred very great benefits on the country, and given an extraordinary stimulus to co-operative enterprise; but it has undeniably been attended with certain mischiefs. Unscrupulous persons, promoters for the most part, have abused the opportunities which the joint stock company system has afforded them, and have enriched themselves by plundering the public and foisting on it worthless schemes at extravagant prices by artful advertising. Something, it has long been felt, had to be done, or attempted, towards checking these frauds, and the Companies Act, 1900, represents the best that the combined wisdom of legal and commercial experts can do for their frustration.

The Act, like every other Act, has its perspective. There are useful provisions, for instance, inserted in it for making a company's certificate of incorporation conclusive, for enabling creditors to apply in a voluntary winding-up, for clearing the Register of Joint Stock Companies of companies which have ceased to carry on business, for rectifying certain abuses in connexion with companies limited by guarantee: but these provisions occupy a subordinate position; they may be described as 'odds and ends' swept in by the legislative broom: not integral parts of the scheme

of the Act. The salient points of the Act, which embody its policy, are in the main four :—

1. To compel full disclosure of material facts in a prospectus by requiring it to set out specific particulars about the company.
2. To secure a certain degree of substantiality in every company before it commences business.
3. To make the first or statutory meeting of shareholders a reality.
4. To establish at Somerset House a register, accessible to all, of a company's principal documents and proceedings.

To touch on each of these very briefly :—

1. It is 'pretty to observe,' as Mr. Pepys would say, the successive efforts to extract candour from the authors of prospectuses. The Legislature began by trusting to that general duty of honesty and good faith on the part of directors, which was so eloquently expounded by Vice-Chancellor Kindersley in *New Brunswick Central Railway Co. v. Muggeridge*, 1 Dr. & Sm. 381. But the Vice-Chancellor's 'golden legacy,' as Lord Hatherley called it, savoured a little too much of a 'counsel of perfection.' Directors could not or did not live up to it, and so in the Companies Act, 1867, s. 38, the Legislature supplemented it by exacting something more definite—the dates and the names of the parties to any contract entered into by the company, the directors, or promoters. Still disclosure was coy, and the Directors' Liability Act, 1890, was passed, visiting directors with damages for any untrue statement in a prospectus made without reasonable grounds—which includes any statement made untrue by a suppression. In the new Act we have the Legislature requiring a prospectus to set out a long list of specified particulars about the company—the contents of the memorandum of association, the names of the directors and the amount of their qualification (if any), the minimum subscription—of which more anon—the number of shares and debentures issued, and the consideration for them, the names and addresses of the vendors—which word is given the widest meaning by the Act—the amount of purchase money, of underwriting commission, of promotion money, the date and parties to every material contract, with a provision for its inspection, full particulars of the nature and extent of the interest of any director—everything in fact which it can possibly concern the recipient of a prospectus to know in order to determine whether he will or will not apply for shares.

The criticism which suggests itself on this—the most important—point of the Act is that the information to be given is so extensive

and multifarious that it is very doubtful whether the recipient of a prospectus will trouble himself to go through these answers to statutory interrogatories, more particularly those which mainly concern him as to the company's vendors, their contracts, and interests. It will not be difficult for the disingenuous promoter to comply with the letter without complying with the spirit of the enactment, and to bewilder in lieu of enlightening.

2. This point of policy, the guarantee of substantiality, is to be found in the sections dealing with 'Going to Allotment' and 'Commencement of Business': a minimum subscription—exclusive of shares paid for otherwise than in cash—must have been obtained, or shareholders are not to be held to their offer to join the enterprise, and their subscriptions are to be forthwith returned; furthermore, the company is not to commence business till it has got a certificate from the Registrar of the statutory conditions having been fulfilled. Pending this certificate *no contracts are to be binding on the company*. The 'minimum subscription' is of course meant to put an end to the too common practice of directors going to allotment on a scandalously inadequate subscription, and does but express what is almost an implied term in every application for shares. The weak point in the legislation is that the minimum subscription is fixed by the articles, which means that it is fixed by the promoters, who are not likely to put it impracticably high: rather, if anything, too low. All that has to be paid up on this minimum is five per cent., so that the statutory conditions will not be much of a test of financial stability; on the other hand, the official certificate entitling the company to commence business is calculated to give the company a fictitious credit with the public.

3. The provisions on this head—as to the statutory meeting—are designed to bring the shareholders on the scene at an earlier date than hitherto, so that they may exercise a real control over the management of the company. The novelty in these provisions consists in the certified report which the directors are required to circulate among the shareholders seven days previously to the meeting, informing them as to the number of shares allotted, the cash received, receipts and payments, and other matters, which will enable the shareholders, when they do meet, to discuss the affairs of the company intelligently. Hitherto, they have had to put up with as much—or as little—information as the directors have deemed it discreet to allow them. The efficacy of the section must, however, depend on the shareholders themselves; whether they will avail themselves of the opportunities of the occasion and really look after their own affairs, or give themselves away by signing proxies in favour of some nominee of the directors or promoters.

4. The last point is the keeping of what is in effect a public file of the company's principal records and proceedings at the Registry of Joint Stock Companies. It is no longer only the memorandum and articles of association and any special resolution which have to be registered at Somerset House, but the prospectus of the company—before it can be issued—the consent of a person to act as director, the return as to allotments, the statutory declaration preliminary to commencing business, the report of particulars for shareholders prior to the statutory meeting, and, most important of all, mortgages and charges created by the Company. If these are not registered within twenty-one days from creation they are to be void, *quâ* security, against a creditor of the Company, or against the liquidator. The singular thing is that the Act does not provide for registration at Somerset House of all a company's mortgages and charges, but only of four specified classes, to wit:

- (a) a mortgage or charge for the purpose of securing any issue of debentures; or
- (b) a mortgage or charge on uncalled capital of the Company; or
- (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
- (d) a floating charge on the undertaking or property of the Company.

These are not exhaustive, and the consequence must be that a lender who wishes to be safe will be driven back on the company's own register of mortgages and charges at its office—the very thing which it seems to have been the aim of the Act to get rid of.

Prophesying is, according to George Eliot, the most gratuitous form of error, and as such to be avoided, but it seems not unlikely that the more unpretending sections of the new Act—the 'oddments'—may in the end prove the most useful.

EDWARD MANSON.

REVIEWS AND NOTICES.

[Short notices do not necessarily exclude fuller review hereafter.]

The County Palatine of Durham: a study in constitutional history. By GAILLARD THOMAS LAPSLEY. New York, London and Bombay: Longmans, Green & Co. 1900. 8vo. xi and 380 pp. (\$2 net.)

MR. LAPSLEY'S work is a fresh proof of the excellent training received by the rising generation of American historical scholars. It is thorough, careful and systematic, and quite free from the ambition of producing something novel, even at the cost of paradox, which is not unknown in Europe. We have here the rise, culmination and decadence of the Bishop of Durham's princely franchise for the first time set forth as a whole. Mr. Lapsley dismisses the common view of a deliberate royal foundation as being wholly devoid of evidence. He considers the rival hypothesis of an intimate connexion with the early independence of Northumbria (which is itself far from certain) plausible but still unproven. His own suggestion is that in any case the see of Durham was the greatest lord in that region both before and after the Norman Conquest, and was enabled to magnify its immunities in the twelfth and thirteenth centuries by skilful and determined use of favourable circumstances. Perhaps there is no stronger illustration of the power of the Crown in England than the amount of power which the King could afford to leave to the Bishop of Durham. The Bishop had his own courts with exclusive jurisdiction, and his own peace; he was an immunist on a grand scale, taking all that the King would have taken elsewhere. Once the King begged a deadend of him as matter of grace. The Bishop as temporal lord issued writs of prohibition to himself as spiritual judge. He exercised the prerogative of pardon. He coined money. He had his exchequer, an enlightened exchequer which used not tallies but indentures. He had his own great officers, and his sheriff assumed the power of gaol delivery till the fourteenth century. Certainly the Bishop ought not to have negotiated with the Scots on his own account, but certainly he sometimes did. The liberty of the bishopric taxed itself separately till 1449, though in practice it copied the action of Parliament. In any other kingdom the Bishop would have become a prince independent in everything but name. But here the royal supremacy was never in real danger. There was no time when the King could not, at need, say 'No farther' and say it with effect. Under the centralizing Tudor rule the substantial though not formal end came by a kind of dignified suicide, when Tunstall, Bishop of Durham, was a willing president of the Council of the North.

F. P.

A Concise Treatise on the Law of Wills. By H. S. THEOBALD. Fifth Edition. London: Stevens & Sons, Lim. 1900. La. 8vo. cxxxix and 861 pp. (32s.)

THE fourth edition of this most useful book on Wills was issued in 1895, and subsequent decisions upon the construction of wills have been sufficiently numerous to make a fifth edition very acceptable, and to increase the length of the text by more than seventy pages.

During this interval there do not appear to have been any new decisions which are likely to take rank as leading cases, for we can have no better authority than the learned author for the statement in the preface to the new edition, that the new cases have not established any new principles.

The chapter on 'Election' has been re-arranged and improved, but it is disappointing to find that no attempt has been made in this chapter to explain the meaning of the well-known but ambiguous expression 'free disposable property,' or to discuss more fully the doubtful application of the 'engrafted doctrine of compensation' to the case where a person elects to take under a will which raises a case of election.

Other chapters, particularly those on Charitable gifts, and on Satisfaction and Ademption, and on Administration, have been to a considerable extent rewritten, and in all cases the new matter includes and incorporates recent decisions down to June 1900.

No purchaser of this edition will regret that the lapse of time since the Wills Act was passed has made it now possible to eliminate much of the old law of wills which had comparatively little application to wills made since the passing of the Act.

The Parliamentary Election Manual. By T. C. H. HEDDERWICK, M.P. Second Edition. London: Stevens & Sons, Lim. 1900. 8vo. xxviii and 386 pp. (10s. 6d.)

THE issue of a second edition of Mr. Hedderwick's work is cunningly timed. We know of no handier or more useful book on election law. It contains information on most things that a candidate or election agent wants to know. It includes chapters on candidates, election agents, unpaid agency, committee-rooms, public meetings, election expenses, and returning officers' charges, and gives annotated reprints of the Corrupt and Illegal Practices Prevention Acts, 1883 and 1895.

Apart from mere legal information the author is able to draw on his political experience for many practical hints as to the working of a parliamentary election. A careful perusal of the section on Unpaid Agency would enable many candidates to avoid the pitfalls awaiting them. For instance, how many persons not versed in election law know that the mere possession of a canvass book, or the fact of driving about the constituency with the candidate, may be evidence of agency? In the *Stroud* case, as Mr. Hedderwick points out, the Court held that the plaintiffs had established the agency of a person who not only had no canvass book, but who was told by the candidate's election agent that he could not employ him. Mr. Hedderwick's advice to members of election committees is summed up in the golden rules: (1) pay nothing, (2) give nothing, (3) promise nothing.

If candidates and their agents duly note the warnings given in the first 200 pages of this book there will be small danger of an enforced reference to the section on Election Petitions some months hence.

Principles and Practice of Conveyancing, intended for the use of students and the profession. By JOHN INDERMAUR. London: Geo. Barber. 1900. xxii and 602 pp. (29s.)

THERE can be no doubt that this work is best adapted for use by students and others in the course of their preparation for the solicitor's examination. To those who know the work it may also be of some value in their subsequent practice, but it can hardly lay claim to be, in any proper sense, a practitioner's book of reference.

The style throughout is more or less colloquial, and the book is manifestly intended to be read immediately before an examination, and only after the student has gathered a knowledge of the law from other sources.

In the first edition of a book ranging over so wide a field it is too much to expect that the author should make no slips or material omissions, but inasmuch as it is of the utmost importance for a student to obtain a correct grounding, it may be well to refer here to a few of the points which seem to have escaped the author's attention.

Thus the author (p. 11) classes a right to dower among estates for life created by operation of law. When the beneficial rights of a doweress are considered this must appear to be incorrect. An estate by the curtesy is no doubt a true life estate, and the holder has the powers of a tenant for life under the Settled Land Acts; not so a doweress, who, for practical purposes, is treated as an incumbrancer, though in certain cases she may have a limited power under the Settled Estates Act, 1877, to grant a lease.

The power for the lord of a manor by custom and with the consent of the Board of Agriculture to grant out waste by copy of court roll (p. 71) seems to have been overlooked.

At p. 89 the rule that in construing wills the Court will, by analogy, have regard to the Statutes of Uses for the purpose of ascertaining in whom the legal estate is vested, seems to have been disregarded. Though the legal estate will now vest in the personal representative the point is still of importance, for after administration he must convey to the proper uses of the will.

In discussing the tortious operation of a feoffment (p. 138) the author ignores the practical value of the tortious operation, and omits to state that under the Conveyancing Acts a long term can now, in a proper case, be enlarged, thus, in effect, restoring the old power.

The statement (p. 261) regarding the title to be shown to land on the preparation of a settlement goes beyond the practice of conveyancers. In the proper sense of the term there is no investigation of title, though the settlor provides sufficient materials to enable the other side to prepare the draft and generally check the position. Moreover the practice, in complicated cases, for each side to prepare their own draft is now becoming very general.

The requisition given at p. 319 respecting a tenant by the curtesy appears to be somewhat out of date, for unless title is made under Part I of the Land Transfer Act, 1897, by virtue of the paramount power of sale of the personal representative (in which case no release would be required), a tenant by the curtesy must either be the vendor or must, as a person having the statutory powers of a tenant for life, join to consent to the trustees exercising their power of sale.

The Law of Animals. By JOHN H. INGHAM, of the Philadelphia Bar. Philadelphia: T. & J. W. Johnson & Co.; London: Stevens & Haynes. 1900. 8vo. 698 pp.

A writer in the 'Revue de Droit International' has recently been discussing 'L'Animalité et son Droit.' Is there beyond 'la grande société de tout le genre humain' a further zone embracing animals? Yes! he answers; true, it has not yet organized itself, this law of animals, but it is tending to do so. The present work illustrates the drift; not that Mr. Ingham is at present prepared to give animals independent rights as distinguished from their rights derived through man, but he is the first to deal—and it is greatly to his credit—with the law of animals as a whole, the first to systematize and rationalize the subject, disengaging its elements from the numberless statutes, reports, digests, and text-books among which it lies scattered. In the seven titles which make up the book the author discourses of Property in Animals—wild and domestic; of the Transfer of Animals—sale, mortgage, and estrays; of the Rights of Owners of Animals; of Injury and Theft; of the Liability of Owners of Animals—trespass, nuisance, and vice; of Bailment and Carriage; and, lastly, of Cruelty to Animals. Some natural regret we cannot help feeling—though it seems ingratitude after being conducted over such a field of learning—that the author did not supplement his discussion of general principles with a digest of the law classified under familiar heads, such as dog, horse, elephant; but no doubt the ready answer would be that to do so—with case law growing at the rate it is both in America and England—would have been to treble or quadruple the size of the work. Already in England the horse has a good sized volume to himself, and the dog is the theme of more than one separate work.

The scienter doctrine which figures so largely in connexion with mischievous animals is one of those doctrines which America owes to England, and for which American lawyers, we gather from Mr. Ingham, are not particularly grateful. Even in the land of its birth the doctrine is recognized as at once too lax and too strict: too lax because it casts on the victim the onus of bringing home knowledge to the owner, too strict because when that knowledge is brought home he becomes an insurer. American law takes the sting out of this last liability because it only exacts in the case of fierce animals special care and precautions. Surely the most rational rule is that adopted by most foreign systems, making the owner of an animal *prima facie* liable for the injury it does, leaving him to clear himself by proving reasonable care, if he can. This scienter question is only one of many interesting points of likeness and unlikeness between American and English law brought into relief by Mr. Ingham's excellent treatise. He is full of suggestive questions. Does, for instance, the fact that a horse is running away in a street without a driver raise a presumption of negligence? Is there property in a cat? Is an oyster tame or wild? We know 'an oyster may be crossed in love,' but it is difficult to conceive of it as '*ferae naturae*.'

We have also received:—

Attachment of Debts, Receivers by way of Equitable Execution, and Charging Orders on Stock and Shares. By MICHAEL CABABÉ. Third Edition. London: Sweet & Maxwell, Lim. Sm. 8vo. xiv and 199 pp. (6s.)—The principal feature of the new edition of Cababé on Attachment, &c.,

is a new chapter, 21 pages long, on 'Charging Orders on Stock and Shares,' with an Appendix of Forms with reference to this branch of the practice. This Appendix is separate from appendices of forms in attachment and receivership proceedings. The book has three indices, one to Attachment of Debts, another to Receivers by way of Equitable Execution, and the third to Charging Orders. Mr. Cababé shows the creditor what pitfalls he must avoid on his way to obtaining the fruits of proceedings to compel payment of the debts justly owing to him, and it is impossible to disagree with the statement in the preface that the law and practice on the subject of execution generally are unsystematic.

The Principles of Pleading, Practice and Procedure in Civil Actions in the High Court of Justice. By W. BLAKE ODGERS, Q.C. Fourth Edition. London: Stevens & Sons, Lim. 1900. 8vo. lx and 494 pp. (12s. 6d.)—Mr. Blake Odgers's book on Pleading is too well known to need much comment. There do not appear to be many changes in this edition. A new chapter on 'Summons for Directions' has been added in consequence of the amendment of R. S. C., Ord. XXX; recent decisions have been duly noted, and the work generally brought up to date.

Principles of the Law of Personal Property. By the late JOSHUA WILLIAMS. Fifteenth Edition by T. CYPRIAN WILLIAMS. London: Sweet & Maxwell, Lim. 1900. 8vo. lxxxi and 631 pp. (21s.)—It is almost impossible to do more than to note the appearance of a new edition of a legal classic like 'Williams on Personal Property.' In this edition the portion of the work dealing with the order of payment of debts in administration has been re-written in consequence of the decision in *Re Leng, Tarn v. Emmerson* [1895] 1 Ch. 652, and some additions have been made to the chapter on Settlements.

Historical Jurisprudence: an Introduction to the systematic study of the development of Law. By GUY CARLETON LEE. New York: The Macmillan Co. London: Macmillan & Co., Lim. 1900. 8vo. xv and 517 pp. (12s. 6d. net.)—This book gives a summary view of the principal ancient systems of law (we do not know why Hindu law has a chapter to itself and Mahometan law is all but ignored); the history of Roman law and its modern reception is briefly traced; and the last chapter sketches the growth of English law down to Bracton.—Review will follow.

The Licensing Acts: being the Acts of 1872 and 1874, together with all . . . Acts relating thereto, with Introduction, Notes, &c. By the late JAMES PATERSON. Thirteenth edition by WILLIAM W. MACKENZIE. London: Shaw & Sons: Butterworth & Co. 1900. 8vo. lvii, 422 and 72 pp. (12s.)—'Paterson on the Licensing Acts' is a compact handbook to all points of licensing law. In this edition the notes have been revised, and, so far as we can see, all recent cases incorporated. Even so late a case as *R. v. Worcestershire Justices*, decided on July 25 last, will be found on p. 253. Reports of the important cases of *Sharp v. Wakefield*, and *Boulter v. Kent Justices*, have also been added to the Appendix.

A Selection of Legal Maxims, classified and illustrated. By HERBERT BROOM. Seventh edition by HERBERT F. MANISTY and HERBERT CHITTY. London: Sweet & Maxwell, Lim. 1900. La. 8vo. 749 pp. (28s.)—We are already pretty far from the time when a desultory compilation of this kind could pass muster as a serious contribution to legal science, and

we doubt whether the attempt to revive it by posting it up with modern references can be of much use either to practitioners or to students. The one thing which it might have been worth while to do, to trace our current Latin maxims to their origins where possible, and note how far their civilian or canonical meaning has been perverted, was wholly omitted by Mr. Broom and has not been supplied by his editors. We do not doubt that the posting up has been well done.

Journal of the Society of Comparative Legislation. New Series, No. 5. Aug. Edited for the Society by JOHN MACDONELL, C.B., and EDWARD MANSON. London: John Murray. 1900. 8vo. 195-406 pp. (5s. net.)—Among the more important articles in this number are papers on 'Status in connection with Colonial Marriages,' by Lord Davey; 'Disciplinary Jurisdiction over Solicitors,' by Mr. H. E. Gribble; 'The Support of War by War,' by Mr. J. S. Risley; 'The Law of South Africa,' by Mr. W. F. Craies; 'Appeals under the Commonwealth of Australia Constitution Act,' by Mr. A. R. Butterworth; 'Modern Developments of Mohammedan Law,' by Sir Raymond West; 'Recent Legislation as to Inebriates in England and the Colonies,' by Mr. Ernest M. Pollock and Mr. A. M. Latter; and 'Nobility in England,' by Mr. E. Manson. The number contains an excellent portrait of the late Lord Chief Justice.

Ruling Cases, arranged, annotated and edited by ROBERT CAMPBELL. With American Notes by LEONARD A. JONES. Vol. XXI. Payment—Purchaser for value. London: Stevens & Sons, Lim. Boston, U.S.A.: The Boston Book Co. 1900. La. 8vo. xxvi and 847 pp. (25s. net.)—Among the important subjects dealt with in this volume are Payment, Pilotage, Poor, Power, Principal and Surety, and Purchaser for value without notice.

Coote's Common Form Practice and Tristram's Contentions Practice of the High Court of Justice in granting Probates and Administrations. Thirteenth Edition. By T. H. TRISTRAM, Q.C., D.C.L. The Common Form portion revised by HENRY A. JENNER. London: Butterworth & Co. 1900. 8vo. xlv, 912 and 82 pp. (32s. 6d.)

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L. Ninth Edition. Oxford: at the Clarendon Press, London & New York: Henry Frowde. 1900. 8vo. xvi and 430 pp. (10s. 6d.)

A Handbook of Thames River Law. By G. PITT-LEWIS, Q.C. London: Effingham Wilson. 1900. 8vo. ix and 410 pp. (15s. net.)

The Law of Agency. By R. G. WOODYATT. London: Wm. Clowes & Sons, Lim. 1900. 8vo. xx and 196 pp. (8s. 6d.)

The Law and Practice relating to Letters Patent for Inventions. By R. W. WALLACE, Q.C., and J. B. WILLIAMSON. London: Wm. Clowes & Sons, Lim. 1900. La. 8vo. lxx and 922 pp. (£2.)

The Practice of Private Bills, with the Standing Orders of the House of Lords and House of Commons, and Rules as to Provisional Orders. By GERALD JOHN WHEELER. London: Shaw & Sons; Butterworth & Co. 1900. La. 8vo. xx and 531 pp. (25s.)—Review will follow.

Roscoe's Digest of the Law of Evidence on the Trial of Actions at Nisi Prius. Seventeenth Edition. By MAURICE POWELL. Two vols. London: Sweet & Maxwell, Lim.; Stevens & Sons, Lim. 1900. 8vo. clxix, iv and 1539 pp. (£2 2s.)

The Law and Practice of Rating. By WALTER C. RYDE. London: Shaw & Sons; Butterworth & Co. 1900. La. 8vo. lix, 756 and 54 pp. (35s.)

Precedents of Deeds of Arrangement between Debtors and their Creditors, with introductory Chapters. By G. W. LAWRENCE. Fifth Edition. By ARTHUR LAWRENCE. London: Stevens & Sons, Lim. 1900. 8vo. xii and 183 pp. (7s. 6d.)

The Revised Reports. Edited by Sir F. POLLOCK, assisted by R. CAMPBELL and O. A. SAUNDERS. Vol. XLV. 1837-1838. (2 & 3 Mylne & Craig, 6 & 7 Adolphus & Ellis, 2 & 3 Nevile & Perry.) London: Sweet & Maxwell, Lim. Boston, Mass.: Little, Brown & Co. 1900. La. 8vo. xiv and 859 pp. (25s.)

Metropolitan Borough Councils Elections. A guide to the election of the Mayor, Aldermen and Councillors of Metropolitan Boroughs. By JOHN HUNT. London: Stevens & Sons, Lim. 1900. 8vo. viii and 140 pp.

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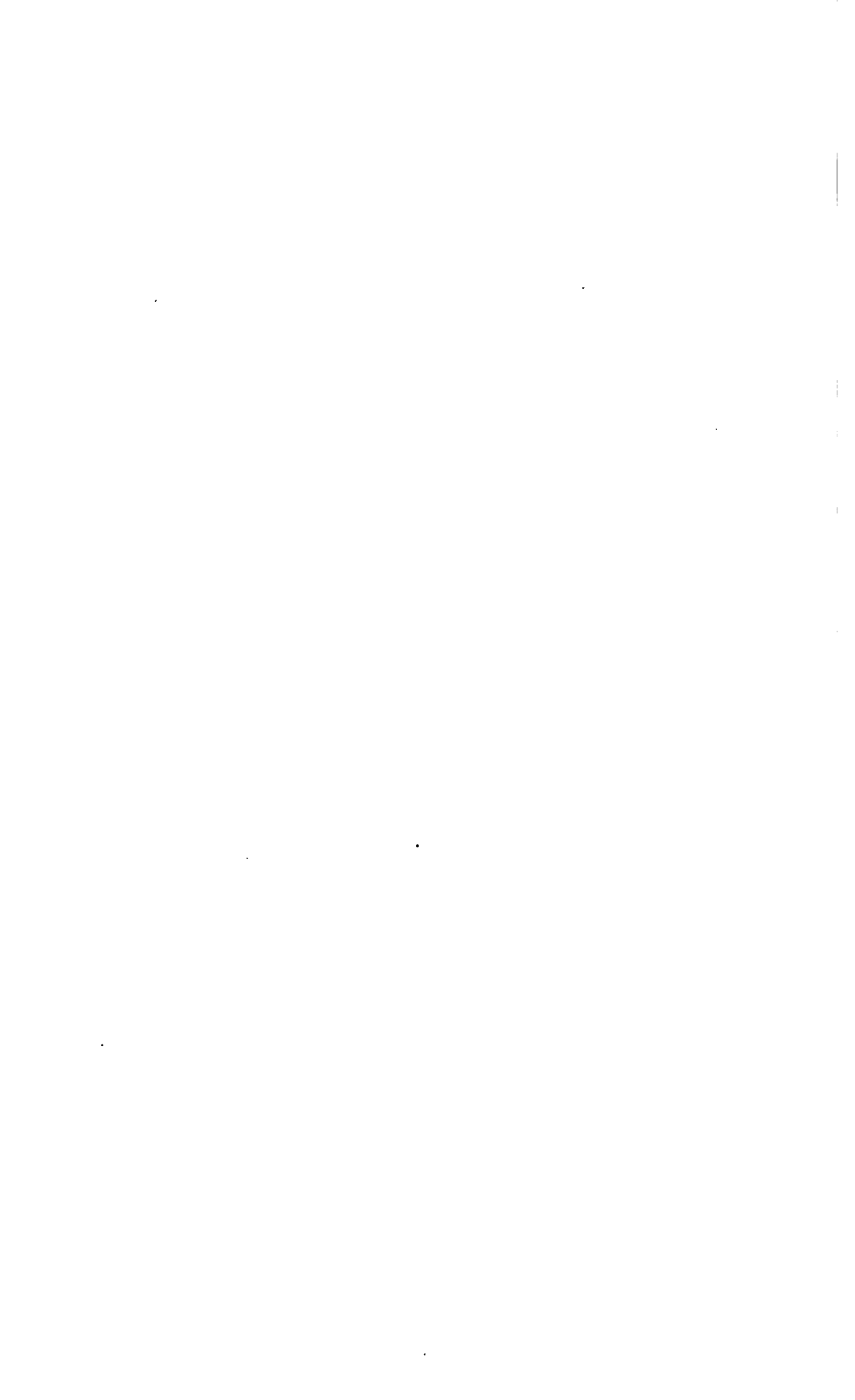
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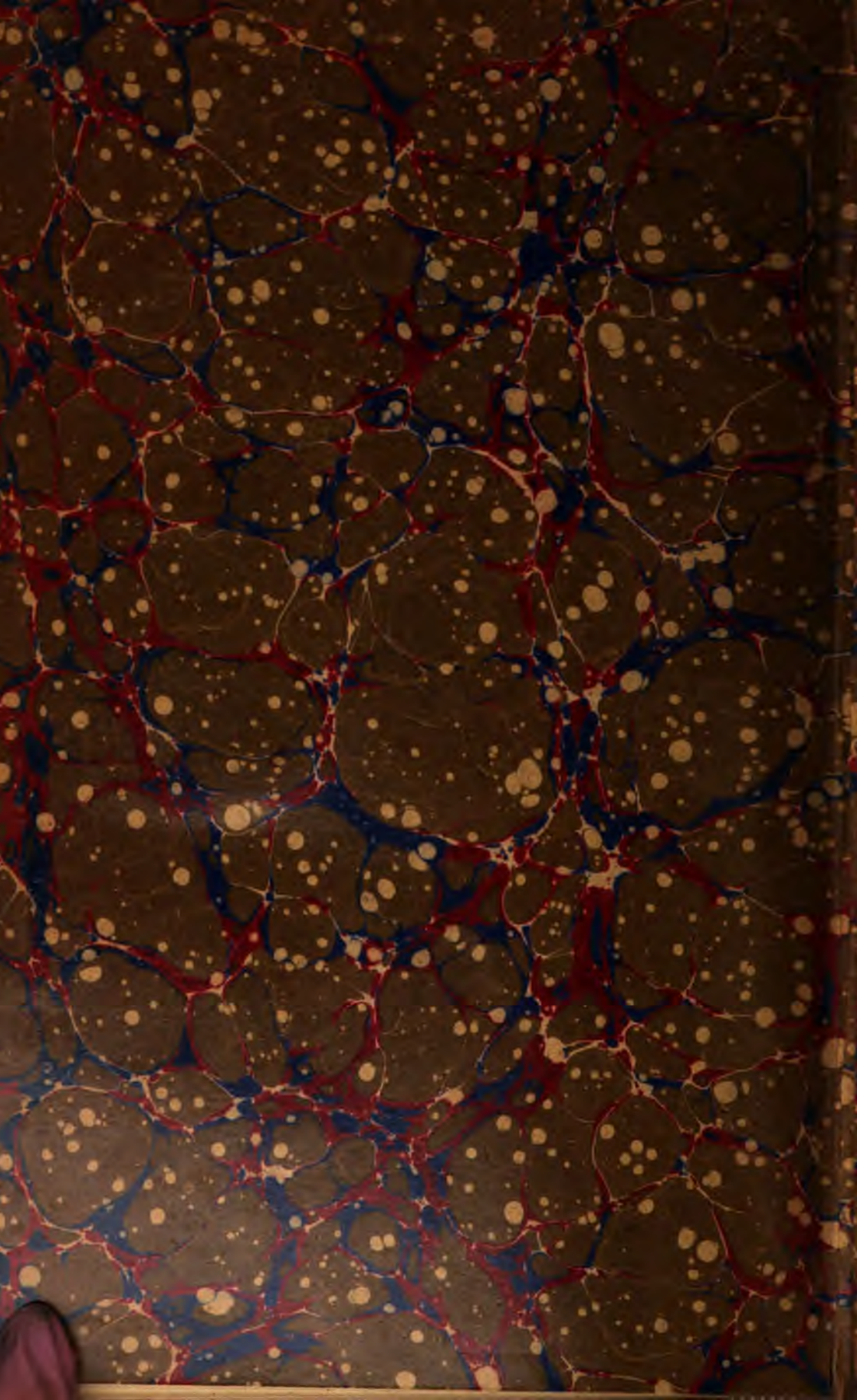
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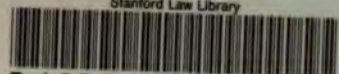
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